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# Survey of Illinois Law for the Year 1938-1939

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## SURVEY OF ILLINOIS LAW FOR THE YEAR 1938-1939[1]

### PERSONS

### MUNICIPAL CORPORATIONS

LEGISLATIVE and judicial activity in the field of municipal corporations during the past year has produced a considerable amount of material of importance to those persons having direct dealings with public agencies. In the legislative field further inroads have been made upon the statutory debt limitations of various political subdivisions. The 2½ per cent limitation was removed in the case of school districts constructing or improving and equipping school buildings;[2] and in the case of cities, villages, and incorporated towns, constructing or improving bridges and airport hangars of landing fields.[3]

A law has also been enacted requiring municipalities to ascertain the prevailing wage rates for all workmen employed upon public construction projects and to specify in the contract documents that such rates must be paid by the contractors to whom public work is awarded.[4] Another act[5] passed by the legislature requires preference to be given on public works projects to resident Illinois laborers who are citizens of the United States or have received their first naturalization papers. The latter statute reflects a growing

1 The present survey is not intended in any sense as a complete commentary upon, or annotation of, the cases decided by the Illinois courts during the past year but is published rather for the purpose merely of calling attention to cases and developments believed significant and interesting. The period covered is that of the judicial year, October to October, embracing from 369 Ill. 232 to 371 Ill. 630; from 269 Ill. App. 541 to 301 Ill. App. 216; and from 98 F.(2d) 833 to 105 F(2d) 1023.

2 Ill. Rev. Stat. 1939, Ch. 113, § 44.2; Laws 1939, p. 845.

3 Ill. Rev. Stat. 1939, Ch. 113, §§ 44.8 and 44.12; Laws 1939, p. 844.

4 Ill. Rev. Stat. 1939, Ch. 48, §§ 39n-39s; Laws 1939, p. 568.

5 Ill. Rev. Stat. 1939, Ch. 48, §§ 269-275; Laws 1939, p. 567.

antagonism toward aliens which is fostered and encouraged by the "disclosures" of various bodies investigating so-called un-American activities and by war and unemployment hysteria.

*Powers and Immunities*

During the past year, the Illinois Supreme Court was again confronted with the difficult task of applying the limitations suggested in the concept of "corporate purposes" as a term fixing the bounds of constitutional municipal activity. In *People* v. *Kelly*,[6] the court decided that land donated for the site of a state armory was used for a corporate purpose—a corporate purpose being defined rather vaguely, and probably necessarily so, as "some purpose which is germane to the objects for which the corporation was created, or such as has a legitimate connection with that object and a manifest relation thereto." A definition of this sort will obviously never embarrass the court and should allow that flexibility of construction which the court regarded as desirable in testing the validity of municipal acts, although at what sacrifice of certainty in the law remains to be seen. In *Burr* v. *City of Carbondale*,[7] the court held that bonds issued as a donation to secure the location of the Southern Illinois Normal University at Carbondale were issued for a public purpose, but in *Livingston County* v. *Weider*,[8] the court decided that bonds issued for the purpose of inducing the establishment of a state reformatory at Pontiac were not issued for a corporate purpose and were void. In a later case, *Norman School* v. *City of Charleston*,[9] however, the court held in effect that a contract by the city of Charleston which obligated it to furnish water to the Eastern State Normal School for a period of fifty years for a nominal consideration of five dollars was not binding upon the city as it did not serve a corporate purpose. The Burr case was explained on the ground that special statute had been enacted by the general assembly expressly authorizing donations by municipalities desiring to bid for the benefits supposed to accrue from the presence of a state institution of learning within the corporate boundaries of the successful bidder. In

6 369 Ill. 280, 16 N.E.(2d) 693 (1938). 7 76 Ill. 455 (1875).
8 64 Ill. 427 (1872). 9 271 Ill. 602, 111 N.E. 573, L.R.A. 1916D 991 (1916).

the Weider case, the court declared emphatically that the construction of a reform school was a state and not a corporate purpose and that no one would want to live near such an institution with its "poisonous influence." The objections of the court were summed up in the following words: "It was the duty of the general assembly to determine, for the whole people of the State, the necessity of a State Reform School. Deciding it was necessary, the enterprise should be promoted by the resources of the State. An offer to receive a donation from a particular locality to secure its location seems inconsistent and degrading to a state boasting of its sovereignty, its wealth and its unbounded resources. . . . If a public institution is needed, the whole State should be regarded, and it should be established where it will best promote the interests and well being of the whole people." A state armory, by contrast, the court argued in the Kelly case, would be an asset to a community since the presence of the militia might tend to prevent destruction of property by riots for which the municipality would be liable. Whether the presence of a large number of soldiers in a city is an unmitigated blessing might seem to be open to some question, just as it might be questioned whether the Board of Supervisors in the Weider case committed a grievous error of judgment in deciding that the county would benefit by the location of a reformatory at its county seat. The primary purpose in bidding for these state institutions, it is submitted, is not that the bidders may share more largely in the activities of the institutions, but rather the expectation that incidental profits will be realized from the flow of business which will inevitably follow the institution with its necessary personnel. Since the municipal authorities are normally in the best position to determine what public functions should be promoted by the municipality, the decision in the Kelly Case, while perhaps not resting on the strongest grounds, is believed to be sound, though not altogether consistent with previous judicial expressions.

The validity of the Illinois Housing Authorities Act was upheld in *Krause* v. *Peoria Housing Authority.*[10] This act[11] provides for the creation of municipal corporations to be

[10] 370 Ill. 356, 19 N.E.(2d) 193 (1939). [11] Ill. Rev. Stat. 1939, Ch. 67½.

known as housing authorities.[12] Municipalities are authorized by the Illinois Housing Authorities Act to enter into contracts with housing authorities providing for cooperation, loaning of employees, furnishing of municipal service to the authority, and granting tax exemption. In return for these services the municipality may make a service charge of 5 per cent of the amount of the rentals derived from the housing project during the first ten years and 3 per cent of the rentals thereafter. The Illinois Supreme Court cited the approving opinions of courts in a number of other jurisdictions in support of its conclusion that such projects serve a public purpose by reducing blighted areas, crime, immorality, disease, and fire hazards. Although the Illinois Housing Authority Act did not expressly provide for tax exemption of housing projects, the court held that such immunity was clearly intended, and that in any event the authorities would be exempt from taxation as charitable institutions under the general revenue act.

The payment of special legal fees to a regularly employed attorney for a municipal corporation for work considered to be outside the scope of such attorney's official duties is illegal, the court held in *Woods* v. *Village of La Grange Park*,[13] if such work is in fact within the scope of the duties incident to the office of municipal attorney. It would appear that the only instance in which a salaried municipal attorney could legally be paid fees in addition to his regular compensation would be in the case of an appointment on a purely nominal retainer basis with express provision for additional compensation for services not of a speci-

12 Cities, villages, and incorporated towns having a population in excess of 25,000, and counties are authorized to determine the need for low cost housing and slum clearance projects in their respective communities and to petition the State Housing Board for a certificate verifying this need and empowering the petitioning municipality to create a housing authority. The housing authority comes into existence after the certificate has been issued and the presiding officer of the municipality has appointed five commissioners to direct its activities. It is authorized to acquire property, enter into contracts, accept loans and grants from the federal government under the Federal Housing Act, 42 U.S.C.A. § 1401 et seq., issue bonds and do certain other things with a view to the construction and operation of low cost housing projects. The Federal Housing Act provides for loans up to 90 per cent of the cost of the project on the security of housing authority revenue bonds payable exclusively out of the rentals from the project, and in addition, authorizes grants in the form of annual contributions up to 3¾ per cent of the actual project cost.

13 298 Ill. App. 595, 19 N.E. (2d) 396 (1939).

fied routine nature or upon the basis of a distinct limitation upon the official duties of the office.[14] It is also important to note that a necessary corollary of the ruling by the Appellate Court would be that a municipality could not legally employ outside counsel to render legal services reasonably falling within the scope of the municipal attorney's duties, unless perhaps it should appear that the regular attorney could not act because of physical incapacity or the burden of other municipal legal work. The practices which prevail in this field might profitably be reviewed in the light of this important decision.

In *Schuler* v. *Board of Education*[15] the court held that a loan of public high school books and laboratory equipment to a private junior college with provision for joint use by the high school and college, in consideration of the college's agreement to cooperate with the high school board in the development of facts which would aid the board in determining whether a public junior college should be established was illegal under Section 20 of Article 4 of the Illinois Constitution as an extension of credit to a private organization.[16] Two cases were cited by the court as supporting its conclusions. In one of these cases, *Murphy* v. *Dever*,[17] the objectionable action consisted of a proposal by a city to finance the cost of constructing a track elevation project over a public street with city funds, the railway company agreeing to repay this cost in a series of annual installments. In the other case, *Washingtonian Home* v. *Chicago*,[18] a statute requiring the city of Chicago to turn over 10 per cent of all its liquor license receipts to a private corporation authorized to receive prisoners sentenced for drunkenness, was held a violation of the constitutional provision noted above.

On the other hand, in *People* v. *Barrett*,[19] the court held

[14] The salary paid to a municipal attorney is the only compensation to which he is entitled for services reasonably falling within the scope of his official duties, the court declared. Since there are no statutory duties incident to the office of municipal attorney in the case of most public bodies in Illinois, the extent of the duties attached to the office will depend upon the terms of the ordinance providing for the office or upon the terms of the contract of appointment.

[15] 370 Ill. 107, 18 N.E. (2d) 174 (1938).

[16] § 2 of "Separate Sections" of the State Constitution was also violated, the court ruled.

[17] 320 Ill. 186, 150 N.E. 663 (1926).

[18] 157 Ill. 414, 41 N.E. 893, 29 L.R.A. 798 (1895).

[19] 370 Ill. 464, 19 N.E. (2d) 340 (1939). Note, 23 Minn. L. Rev. 827.

that a state appropriation to the widow of a state assemblyman of the amount of salary to which he would have become entitled had he not died between the date of his election and the opening of the assembly, was primarily an expenditure for a public purpose and did not violate Section 20, Article 4 of the Constitution. The court held that the legislature could pay moral obligations as well as legal debts and that the appropriation in question was sanctioned by long established practice. It should be noted, however, that "moral obligations" are not susceptible of precise definition and that if the legislature is to be allowed the latitude suggested by this case, the constitutional restraint upon the expenditure of public funds for private purposes is apt to be applied rather weakly and capriciously. The really important consideration which should govern in these cases is whether the public body receives direct and substantial benefits in return for the expenditure of its funds. If it does, there is, of course, no donation and no loaning of credit, but an exchange. This was recognized by the court in *Maffit* v. *City of Decatur*,[20] when it was held that a city's agreement to pay cash to a private water company, to grant it a share of the city's water rentals, and to vacate certain streets and alleys in its favor in return for the use of the company's reservoir was an exchange and not a loan or donation.

The minimum wage act for firemen[21] was upheld in *People* v. *City of Springfield*,[22] over the objection that the act indirectly imposed a tax for corporate purposes upon the municipalities affected, without their consent and in violation of Sections 9 and 10 of Article 9 of the Illinois constitution. The court held that "corporate purposes" within the meaning of these sections do not include governmental functions of state-wide concern but only matters of a local or proprietary nature. This holding appears to be in accord with previous decisions.[23] although it has been held that the state legislature cannot constitutionally clothe nonmunicipal officers with the power to impose tax burdens upon a municipality even for governmental functions.[24]

[20] 322 Ill. 82, 152 N.E. 602 (1926). [21] Ill. Rev. Stat. 1939, Ch. 24, § 860 (d).
[22] 370 Ill. 541, 19 N.E. (2d) 598 (1939). Note, 27 Ill. B. J. 312.
[23] People v. Board of County Commissioners, 355 Ill. 244, 189 N.E. 26 (1934); People v. City of Chicago, 351 Ill. 396, 184 N.E. 610 (1933).
[24] Lovingston v. Wider et al., 53 Ill. 302 (1870).

Another decision rendered during the year, on a municipality's power to use public resources for the purpose of promoting nonpublic interests was *Ginter-Wardein Company* v. *City of Alton*.[25] An ordinance of the city of Alton recited that a bridge running down the center of a street, supported by posts which left a six-foot way on one side and a nine-foot way on the other, was a hazard to traffic, and authorized a YMCA unit with property abutting on the street to build a concrete fill flush with the bridge in the nine-foot passageway. In return, the YMCA agreed to grant to the city a perpetual easement for the use of a corner of its property so as to permit vehicular traffic to enter the bridge from a fronting cross street at a forty-five degree angle instead of the previous ninety-degree angle. This arrangement, the court held, was merely a colorable attempt to surrender a public street to exclusive private use, and was, therefore, illegal. The recitation of benefits supposed to flow to the city from the transaction was not conclusive upon the court, according to the prevailing opinion. Three justices, however, dissented. The decision rests entirely upon the ground that the public's interest in city streets cannot be defeated by a vacation in favor of a private person.[26] This decision should be compared with *People* v. *Field & Company*,[27] *People* v. *City of Chicago*,[28] *Neilsen* v. *City of Chicago*,[29] and *Gerstley* v. *Globe Wernicke Company*.[30] In the Neilsen case the court said that when a street shall be vacated is a legislative and not a judicial question and in *People* v. *City of Chicago*, the court declared that it was not its province to pass upon the reasonableness of an act of the general assembly making a street vacation ordinance duly passed conclusive on the question of public benefits to be derived from the authorized vacation. In both of these cases it was held that the vacation of a street could be conditioned upon the payment of compensation by abutting property owners, and in the latter case, involving the vacation of a narrow alley, the court was impressed by the fact

25 370 Ill. 101, 17 N.E. (2d) 976 (1938).

26 § 2 of the "Separate Sections" and § 20 of Art. 4 of the State Constitution were not cited.

27 266 Ill. 609, 107 N.E. 864, Ann. Cas. 1916B 743 (1915).

28 321 Ill. 466, 152 N.E. 141 (1926).

29 330 Ill. 301, 161 N.E. 768 (1928).

30 340 Ill. 270, 172 N.E. 829 (1930).

that vacation would remove a hazard, reduce maintenance costs, and relieve the city from possible damage claims. Apparently the time and manner of vacating public streets are only primarily legislative questions and the courts will reach an independent determination on the sufficiency of benefits to justify the vacation.

### *Police Power*

Several cases involving the exercise of the police power reached the Supreme Court. In *City of Chicago* v. *Ingersoll Steel Corporation,*[31] the court held that the provision[32] conferring upon cities and villages the power "to direct the location and regulate the use and construction of . . . machine shops, garages," etc., does not authorize the licensing and regulation of machine shops in connection with manufacturing plants and not serving the public generally. Whether there is any difference between such shops and public shops, insofar as the need for regulation is concerned, is beside the point, the court declared. The power to regulate the businesses listed in the act extends only to such concerns as accept business from the general public. A similar result was reached in *Crerar Clinch Coal Company* v. *City of Chicago,*[33] involving an attempted regulation of private garages. Wholesalers dealing only occasionally with the general public have been held exempt from municipal licensing.[34]

The extent of a city's police power was also considered in *American Baking Company* v. *Wilmington,*[35] involving the validity of a municipal ordinance requiring a fifteen-dollar license fee for all vehicles used in the city for the delivery of food, but exempting vehicles operating in conjunction with licensed and inspected food-dealing establishments. The complainants, seeking to enjoin the enforcement of the ordinance, showed that their trucks were licensed by the state and that their principal place of business, including their trucks, was also inspected and approved under the pure-food laws of Illinois and the United States. The court,

31 371 Ill. 183, 20 N.E. (2d) 287 (1939). 32 Ill. Rev. Stat. 1939, Ch. 24, § 65.81.
33 341 Ill. 471, 173 N.E. 484 (1930).
34 City of Chicago v. Northern Paper Co., 337 Ill. 194, 168 N.E. 884 (1929); Eastman et al v. City of Chicago, 79 Ill. 178 (1875).
35 370 Ill. 400, 19 N.E. (2d) 172 (1939).

nevertheless, held the regulation valid and declared that it was immaterial whether or not the ordinance was being enforced against resident dealers as suggested on behalf of the petitioners. In several previous cases the court had held that a municipality could not discriminate against nonresidents in the exercise of its regulatory powers, but the discrimination involved was uniformly evident in the regulatory provisions.[36] The effect may well have been the same in the instant case due to a tacit understanding that the ordinance, though general in scope, would not be applied in the case of local merchants. The possibilities for abuse of constitutional rights in this sort of under-cover discrimination should call for a more appreciative consideration than that involved in the court's statement that an ordinance is not void because of a city's failure to enforce it.[37]

A Sunday closing ordinance came under judicial scrutiny in *City of Mt. Vernon* v. *Julian*[38] and was held unconstitutional. The ordinance in question made it unlawful to keep open on Sunday any place of business except hotels, restaurants, drug stores, tobacco stores, confectionery stores, news dealers, ice dealers, garages, and moving picture theaters. The proprietor of a community grocery store was convicted in the trial court of violating this ordinance, but upon appeal the Supreme Court reversed the conviction, holding that the ordinance, as applied to the defendant, bore no substantial relation to the health, morals, safety or welfare of the public. It is not entirely clear from the decision whether the court thought that it would be unreasonable under any circumstances to prohibit a business which is harmless and inflicts no damage, or whether the objection lay in the particular classification employed which permitted businesses to operate which would generally be considered more objectionable than a community grocery store. Two earlier cases upholding more power to pass similar ordinances were expressly overruled.[39] A third case, *Richmond* v. *Moore*,[40] was also inferentially if not directly overruled in

36 See City of Elgin v. Winchester, 300 Ill. 214, 133 N.E. 205, 22 A.L.R. 1481 (1921).
37 See Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).
38 369 Ill. 447, 17 N.E. (2d) 52, 119 A.L.R. 747 (1938).
39 City of Springfield v. Richter, 257 Ill. 578, 101 N.E. 192 (1913); City of Clinton v. Wilson, 257 Ill. 580, 101 N.E.192 (1913).
40 107 Ill. 429 (1883).

so far as it held that "the legislature has the sole power to prohibit every kind of secular labor or business on Sunday, or such only as it may choose. . . . " This holding, the court decided, was in direct conflict with the case of *Eden* v. *People*,[41] in which it was held that "not even the legislature has the power to pick and choose as to what kind of secular labor it will prohibit without reference to a proper exercise of the police power." It is to be noted that the decision in *McPherson* v. *Village of Chebanse*,[42] upholding a comprehensive Sunday closing ordinance was not commented upon.[43] In the light of the decision in the instant case, it is evident that serious restrictions have been placed upon the power hitherto supposed to exist with reference to the prohibition of business on Sunday.

*Zoning*

Three zoning cases of minor importance were decided by the Supreme Court during the year. In *Johnson* v. *Village of Villa Park*,[44] an ordinance which excluded undertaking establishments from a "Class B Residential" district was held unreasonable, capricious, and without substantial relation to the general welfare, in view of the fact that public museums, farming, hotels, greenhouses, and hospitals were permitted in the district. A similar result was reached in *Catholic Bishop of Chicago* v. *Kingery*,[45] where a zoning ordinance excluded parochial schools from a district zoned as "A Residential" but permitted single family dwellings, churches, public schools, libraries, and truck gardens. The immediate test applied in both of these cases was whether or not the excluded uses were essentially different from and incompatible with the permitted uses so as to support a general design for the protection of the public welfare in a particular area. The third case, *Morgan* v. *City of Chicago*,[46]

41 161 Ill. 296, 43 N.E. 1108, 52 Am. St. Rep. 365, 32 L.R.A. 659 (1896).

42 114 Ill. 46, 28 N.E. 454, 55 Am. St. Rep. 857 (1885).

43 Although the decision in that case did not indicate that there were exceptions to the closing ban, the record disclosed that meat markets, drug stores, groceries and barber shops were excluded. The only Sunday closing law decision clearly sustained in the instant case was that in the Eden case, holding void an ordinance which required barber shops to close while permitting merchants, druggists, and butchers to remain open.

44 370 Ill. 272, 18 N.E. (2d) 887 (1939). 45 371 Ill. 257, 20 N.E. (2d) 583 (1939).

46 370 Ill. 347, 18 N.E. (2d) 872 (1939).

held that an ordinance making an exception to the operation of a previously adopted general zoning ordinance, pursuant to a recommendation by the Board of Zoning Appeals, was proper where the original zoning ordinance provided for exceptions in cases of unusual hardship. In an earlier case, *Welton* v. *Hamilton*,[47] the court had decided that the board itself could not constitutionally vary the terms of a zoning ordinance in situations involving elements of undue hardship, because the standards by which its discretion was to be guided were insufficient.

### *Mechanics' Liens*

A municipality is not liable, the Supreme Court held in *Gunther* v. *O'Brien Brothers Construction Company*,[48] to a subcontractor on a public construction project, because of its failure to secure a statutory bond from the principal contractor conditioned upon the performance of the contract in accordance with contract specifications and upon the payment of all labor and material claims. This question had never been settled in Illinois, and in other jurisdictions a decided conflict of opinion exists. In some jurisdictions, it has been held that the municipality is not liable but that the officers charged with the duty of securing the bond are liable to anyone injured by their nonfeasance. In other jurisdictions the municipality has been held, but not the offending officers unless they acted fraudulently. It is believed that the decision in the instant case represents the majority view. However, the other aspects of this problem, namely the question of possible liability on the part of municipal officers whose failure to comply with the statute gave rise to unprotected losses, remains unsettled. For the present, it is apparently incumbent upon those who contemplate furnishing labor or materials on public projects to ascertain at their own risk whether the statutory bond designed for their protection has been secured.

## CORPORATIONS

In *People* v. *Hughes*,[49] mandamus was sought to compel the secretary of state to issue a corporate charter, under the

[47] 344 Ill. 82, 176 N.E. 333 (1931). [48] 369 Ill. 362, 16 N.E. (2d) 890 (1938).
[49] 296 Ill. App. 587, 16 N.E. (2d) 922 (1938).

"not for pecuniary profit" act,[50] to a labor union. The court said that prior to July 9, 1937, the petition might have been of avail, but that by amendment of that date the legislature specifically enumerated the classes of associations which could be incorporated thereunder, thereby intending to exclude those not mentioned. "Industrial or trade associations" were specifically included, but the court considered the relator's proposed "Allied Federation of Labor" not to fall within a proper definition of "industrial or trade associations," which has the commonly accepted meaning of commercial enterprises and trades employing capital and labor. Admittedly a labor union or federation of labor or laborers does not fall within the definitition. Nor could the plaintiff incorporate under the words, "other similar purposes," since labor unions are not similar in fact to any of the things named in the amendment.

In *Kraft* v. *Garfield Park Community Hospital*,[51] the Appellate Court upheld a judgment obtained by trial based upon a contract liability of the Garfield Park Hospital, a corporation for profit. The action was against the Community Hospital, a corporation not for profit, expressly organized to take over and continue to operate the original hospital. The new corporation paid interest on a bond issue of the old corporation for about three years and then paid no more. On maturity of the plaintiff's bonds of the old corporation, he brought this action against the new corporation on the theory that the new one had by operation of law succeeded to the assets of the old and thereby also assumed the debts of the old corporation. While a by-law passed to make the transaction clear was considered by the Appellate Court in arriving at the conclusion, it was corroborative and not decisive. The conclusion was reached that the new corporation was liable without the necessity of direct assumption to pay the old obligations on the "change of coat" theory, *i.e.*, that same individuals, same officers, same management, continuation of same business in same place result not in a sale, but in a merger, and that liability follows. Strange as it may seem, the Appellate Court could find no Supreme Court de-

50 Ill. Rev. Stat. 1939, Ch. 32, § 158.
51 296 Ill. App. 613, 16 N.E. (2d) 936 (1938).

cision applicable and therefore cited as Illinois authority two appellate decisions[52] of similar import.

Illinois has long held to absolute nonliability of charitable corporations for tort,[53] disregarding limits, demarcations, and exceptions developed in other jurisdictions. The South Chicago Hospital case[54] consistently applied the rule, but the case is of interest for the reason that upon the trial, the lower court did not permit the hospital to present all the facts and circumstances that would tend to prove that the hospital was used only for charitable purposes. The Appellate Court held such proof not necessary since the charter of the corporation was in evidence (showing no stock, no dividends, no operation for profit) and was sufficient evidence of its character and purpose, and in the absence of contradictory evidence the law presumes the corporation to be a charitable institution. The maintaining of a training school for nurses who pay tuition or render services would be of no effect.

Several attempts were made in the last year by not-for-profit corporations to come within the beneficial cloak of charitable corporations for tax exemption purposes. *Oak Park Club* v. *Lindheimer*[55] is typical, and the language employed by the Supreme Court has turned back several attempts to remove property of such corporations from the assessor's lists. Many such corporations engage in laudable community and charitable projects, beneficial to the welfare of deserving families on the economic margins. Yet, since the primary purpose of such corporations is not charitable, nor is the corporate property used primarily for charitable purposes, but rather for social purposes of the members, neither the purpose nor the activities are sufficient to exempt the property.

It is well to note *Hall* v. *Metropolitan Life Insurance Company*[56] — although the case involves primarily a practice

52 Acorn Lumber Co. v. Friedlander Box Co., 240 Ill. App. 425 (1926); Chicago Smelting & Refining Corp. v. Sullivan, 246 Ill. App. 538 (1927).

53 See Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991, 2 L.R.A. (N.S.) 556 (1905).

54 Maretick v. South Chicago Community Hospital, 297 Ill. App. 488, 17 N.E. (2d) 1012 (1938). Note, 6 U. of Chi. L. Rev. 518.

55 369 Ill. 462, 17 N.E. (2d) 32 (1938).

56 298 Ill. App. 83, 18 N.E. (2d) 388 (1938).

question—in which the Appellate Court holds that service of process on a foreign corporation is not necessarily different from service on a domestic corporation and permits leaving a copy of a writ or notice with any officer or agent of the defendant found in the county without requiring that an effort be made to serve the president first.[57] Yet, in another recent case,[58] it was held that serving of officer or agent whose relation to the claim in suit makes it to his interest to suppress the fact of service, will not be good service as to the corporation.

FAMILY

To lessen a hardship created by the so-called "Saltiel" Law, the legislature amended the Marriage Act so as to permit the issuance of a marriage license despite a positive result in the required medical test whenever it appears: (1) that the woman applicant is then pregnant; (2) that the woman applicant has given birth to an illegitimate child who is then living, provided the prospective spouse makes affidavit that he is the father of such a child; or (3) it appears that the contemplated marriage may be consummated without serious danger to the health of either party.[59] A companion measure seeks to protect the health of the family hereafter by requiring a medical examination of every pregnant woman to ascertain, and, presumably, to prevent, the presence of pre-natal syphilitic infection.[60]

The nature of the fiduciary relationship between persons engaged to be married received attention of the courts in *Kosakowski* v. *Bagdon*[61] with the result that hereafter gifts between such persons will be prima facie presumed induced by fraud and undue influence so as to compel the donee to

57 Ill. Rev. Stat. 1939, Ch. 110, § 141.

58 Personal Loan & Savings Bank v. Schuett, 299 Ill. App. 421, 20 N.E. (2d) 329 (1939).

59 Ill. Rev. Stat. 1939, Ch. 89, § 6a.

60 Ill. Rev. Stat. 1939, Ch. 91, § 113a-c.

61 369 Ill. 252, 16 N.E. (2d) 745 (1938). In that case a daughter sued her stepfather to set aside a deed executed by her mother while engaged to the grantee. The defendant, who subsequent to the grant, married the grantor, claimed the conveyance was made for a valuable consideration. Held, plaintiff was only obliged to offer proof of execution of the deed during the existence of the engagement to make out a prima facie case that the deed had been secured by undue influence without any necessity of showing that defendant was the dominant party or that actual fraud was present. Farthing, J., dissented.

prove the absence thereof if such gift is to be retained. In earlier cases persons standing in the relation of attorney to client, guardian to ward, parent to child, trustee to beneficiary, or agent to principal had been obliged to disprove the prima facie presumption of fraud which arose upon mere proof of the relationship and the transaction. In cases involving the relation of husband and wife, however, the courts had previously held that the person seeking to rescind the gift between the spouses had to offer in addition some factual proof that the donee was the dominant party before any presumption of fraud or undue influence could be indulged in.[62] While engaged couples are not yet husband and wife, it seems unusual that a different rule should apply prior to the marriage than will be followed subsequent to the ceremony.

Hereafter in actions for separate maintenance[63] it appears settled that the court may also adjudicate property rights between the spouses in the same fashion as occurs in divorce cases.[64] The doubt that existed as a consequence of dictum contained in *Decker* v. *Decker*[65] to the effect that the court had such jurisdiction, and the clear cut denial thereof in *McAdams* v. *McAdams*,[66] has now been resolved in *Glennon* v. *Glennon*,[67] in which the Appellate Court pointed out that since the enactment of Section 44 of the Civil Practice Act[68] allowing the joinder of several causes of action, whether legal or equitable, in the same complaint, the question of whether the court gets its power to pass on such questions from the separate maintenance statute[69] or from some other statutes[70] is now rendered moot.

The state of the law relating to divorce, however, has become disturbed in two particulars by the decision in *Berlingieri* v. *Berlingieri*.[71] The first involves the interpretation of the residence requirement prescribed by Section 3 of the Divorce Act.[72] Heretofore, upon marriage, it was assumed

62 Scully v. Wilhelm, 368 Ill. 573, 15 N.E. (2d) 313 (1938); Mahan v. Schroeder, 236 Ill. 392, 86 N.E. 97 (1908).

63 Ill. Rev. Stat. 1939, Ch. 68, § 22. 64 Ill. Rev. Stat. 1939, Ch. 40, § 18.

65 279 Ill. 300, 116 N.E. 688 (1917). 66 267 Ill. App. 124 (1932).

67 299 Ill. App. 13, 19 N.E. (2d) 412 (1939).

68 Ill. Rev. Stat. 1939, Ch. 110, § 168. 69 Ill. Rev. Stat. 1939, Ch. 68, § 22.

70 Ill. Rev. Stat. 1939, Ch. 68, § 10.

71 372 Ill. 60, 22 N.E. (2d) 675 (1939), reversing 297 Ill. App. 119, 17 N.E. (2d) 354 (1938).

72 Ill. Rev. Stat. 1939, Ch. 40, § 3, requires that plaintiff (1) reside within the

by most lawyers that the wife's residence became that of the husband and continued so to be until the husband's conduct justified the wife's departure and the assumption by her of a new residence. Consequently, in order to give the Illinois courts jurisdiction for the purpose of divorcing the parties it was essential that the injured party establish an actual home in this state for the requisite period unless the marital domicile was already within the state.[73] In the Berlingieri case the wife, who had been a lifelong resident of Illinois, married an itinerant foreigner in the state of New York and shortly thereafter went to California, apparently on a visit. While they were there, the acts of cruelty relied upon occurred, and the wife returned promptly to Illinois and filed her action within three months from the date of the marriage. It was held that she had complied with the jurisdictional requirements of the statute, though the court did not specify into which type of case her particular situation fitted.[74] In so doing the court refused to adopt the principle that the domicile and residence of the wife followed that of the husband, necessitating the former's return to this state and continued presence therein for the statutory period. Because of the fact that the husband had not yet provided a home for his wife and, from all indications, possessed none of his own to which her residence could be transmitted, the decision was probably justified. Whether the same result would follow if the nonresident husband had a settled abode, though the wife had not yet taken up residence therein, remains now to be determined.[75]

The Berlingieri case also casts doubt upon the definition of the term "extreme and repeated cruelty" as used in the Divorce Act.[76] Heretofore the defendant's conduct, to war-

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state for one whole year next before filing suit, unless (2) the cause relied on was committed within the state, or (3) one or both of the parties resided in this state.

[73] Way v. Way, 64 Ill. 406 (1872); Derby v. Derby, 14 Ill. App. 645 (1884).

[74] It might be inferred that the holding came under either the general provision of "residence within the state for one whole year," treating the absence from the state as a mere temporary leaving, or under the exception that "one or both of the parties reside in this state."

[75] On this question, the case of Bowman v. Bowman, 24 Ill. App. 165 (1887), not referred to in either the Appellate Court or Supreme Court opinions in the Berlingieri case, may shed some light.

[76] Ill. Rev. Stat. 1939, Ch. 40, § 1.

rant absolute divorce, had to be such physical violence, resulting in bodily harm, as would put the person against whom the acts were directed in danger of life and limb.[77] In holding that defendant's conduct in the Berlingieri case was sufficient to constitute a ground for divorce, the court said: "In the instances described, she was subjected to physical abuse and this is all the statute required."[78] Comparison between the acts allegedly committed by defendant and those found in earlier decisions leaves doubt as to the necessity, hereafter, of danger to life and limb.[79]

Of further interest to the divorce practitioner is the amendment to Section 5 of the Divorce Act regarding venue which now permits the action to be brought in "any court of the county, where the plaintiff so resides, that may have jurisdiction to hear and determine divorce proceedings, upon written entry of appearance by the defendant, being filed there."[80] Such actions have been principally confined to the circuit courts for the reason that the city courts, for example, have had jurisdiction only where the parties were residents of the municipality.[81] Persons seeking divorce without notoriety may now utilize other more remote tribunals.[82]

The right of the surviving parent to the sole and exclusive custody of his or her minor children, when the parent is a fit

77 In Wesselhoeft v. Wesselhoeft, 369 Ill. 419, 17 N.E. (2d) 56 (1938), the last expression of the Supreme Court of Illinois on the subject prior to the Berlingieri case, the court said: "Cruelty constituting ground for divorce under the statute means physical acts of violence, bodily harm or suffering, or such acts as endanger life or limb or such as raise a reasonable apprehension of great bodily harm."

78 Berlingieri v. Berlingieri, 372 Ill. 60 at 63, 22 N.E. (2d) 675 at 677 (1939).

79 Two definite instances of violence appear in the Berlingieri case: one, a blow on the face which, perhaps, blackened the plaintiff's eyes; the other, a blow on the head driving hairpins into her head; neither of which, in the Appellate Court's opinion, caused the plaintiff to fear bodily harm. The Supreme Court cited Trenchard v. Trenchard, 245 Ill. 313, 92 N.E. 243 (1910) in which a violent shaking on one occasion, and a violent pushing against a door on another were held insufficient; Fizette v. Fizette, 146 Ill. 328, 34 N.E. 799 (1893), where only one act, a shove nearly knocking the plaintiff off sidewalk, was clearly insufficient; and the Wesselhoeft case referred to in footnote 77, in which a blow on the head leaving a dent still present at the time of the trial, and another blow in the chest, knocking plaintiff against a stove shortly after her recovery from pneumonia, were deemed enough.

80 Ill. Rev. Stat. 1939, Ch. 40, § 6, as amended by House Bill 103, approved May 16, 1939.

81 Ill. Rev. Stat. 1939, Ch. 37, § 333; Masure v. Masure, 171 Ill. App. 438 (1912).

82 Active use has already been made of the permission granted by this amendment. See Chicago Tribune, Oct. 18, 1939, Vol. XCVIII, No. 249, p. 32, in which

custodian, was vindicated in *Kulan* v. *Anderson*,[83] in which case a father, in a habeas corpus proceeding, successfully challenged an order which required him to share such custody with a maternal aunt, who, by the order, was given the child for week-end periods.[84] The court distinguished the situation from that arising in cases of divorce wherein division of custody is expressly authorized by statute,[85] pointing out that in habeas corpus proceedings the court may only remand the person into custody or else release him or her entirely.

## MASTER AND SERVANT

### *Labor Law*

The past year has witnessed the apparent establishment of the rule that the Illinois Anti-Injunction Act[86] applies only where an employer-employee relationship exists and that where there is no dispute between an employer and his employees, strangers may be enjoined from interfering by peaceful picketing with that relationship.[87] Although in both the Meadowmoor[88] and the Swing[89] cases violence was in-

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Judge Theodore Forby at Zion is quoted, concerning a case involving residents of Waukegan, as follows: "It is very apparent that the act opens the door for attempts to procure divorces in a surreptitious manner, and, unfortunately, modern society is surfeited with people who like to look around corners to find a way out of their predicament." See also Chicago Tribune, Oct. 31, 1939, Vol. XCVIII, No. 260, p. 2, for a case involving residents of Chicago who secured a divorce at Calumet City which fact remained secret for thirty days.

83 300 Ill. App. 267, 20 N.E. (2d) 987 (1939), decided by First District, Second Division.

84 Not so successful was the parent in People ex rel. Whalen v. Sheehan, 300 Ill. App. 228, 20 N.E. (2d) 809 (1939), decided by the First District, Third Division, who sought modification of a similar order entered in a habeas corpus proceeding, but which application was made too late, having been presented more than thirty days after the entry of the original order providing for divisible custody. That division of the Appellate Court expressed its opinion, though unnecessarily, to the effect that the court did possess jurisdiction to enter such orders without citing any Illinois case, but referring to decisions in Colorado and Georgia.

85 Ill. Rev. Stat. 1939, Ch. 40, § § 14, 19.

86 Ill. Rev. Stat. 1939, Ch. 48, § 2a.

87 Meadowmoor Dairies v. Milk Wagon Drivers' Union, 371 Ill. 377, 21 N.E. (2d) 308 (1939); cert. den. 7 U.S.L. Week 421; reh. den. id. 638. See note, 17 CHICAGO-KENT LAW REVIEW 385. Swing v. The American Federation of Labor, 372 Ill. 91, 22 N.E. (2d) 857 (1939). The decisions turn substantially on the proposition that the Illinois Act is similar to Section 20 of the Clayton Act, 29 U.S.C.A. § 52 (see 371 Ill. at 385, 386) and must receive the same interpretation as to scope (Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1920)); in spite of clear differences in the wording of two statutes. See on this point the dissenting opinion of Mr. Justice Farthing in the Swing case at pp. 99-101.

88 371 Ill. 377 at 389, 21 N.E. (2d) 308 (1939).

89 372 Ill. 91 at 93, 22 N.E. (2d) 857 (1939).

volved which the court could conceivably have decided would warrant the issuance of an injunction despite the statute,[90] and although there was also present in the Meadowmoor case a possibly enjoinable secondary boycott,[91] it is apparent from the decisions[92] that the rule announced is not to be considered narrowed by these facts. The two cases, in effect, overrule the pronouncement in *Schuster* v. *International Association of Machinists,*[93] that the Illinois act was broad enough to cover labor activities of strangers.[94] The Illinois rule permitting strikes for closed shops[95] was reaffirmed in *Hoffman* v. *Chicago Laundry Owners' Association,*[96] where complainants, working under contracts at will, were given the option of joining the defendant union or being discharged.[97]

In *Ledford* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Company,*[98] however, where there was no threat or strike on the part of a union, the plaintiff switchmen were held to have stated a cause of action where they alleged that they had not been recalled from a temporary lay-off, although they had not been discharged, while other workers, members of the union, were recalled, in violation of the plaintiffs' seniority rights, all as a result of a conspiracy between the company and the union to keep all nonunion men out of jobs.

90 Cf. Exchange Bakery & Restaurant v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927); Fenske Bros. v. Upholsters' International Union, 358 Ill. 239, 193 N.E. 112 (1934), would not prevent such an order.

91 371 Ill. 377 at 383, 21 N.E. (2d) 308 (1939).

92 371 Ill. 377 at 380, 384, 391, 21 N.E. (2d) 308 (1939); 372 Ill. 91 at 94, 97, 22 N.E. (2d) 857 (1939).

93 293 Ill. 177, 12 N.E. (2d) 50 (1937).

94 A distinction was attempted by the Appellate Court in the Swing case, 298 Ill. App. 63 at 71, 18 N.E. (2d) 258 (1938). Note, 33 Ill. L. Rev. 722.

95 Kemp v. Division No. 241, 255 Ill. 213, 99 N.E. 389 (1912).

96 297 Ill. App. 441, 17 N.E. (2d) 994 (1938).

97 Cf. Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900). Interesting points involving the validity of an agreement between the defendant association of laundry owners and the defendant laundry union whereby the association agreed to maintain a closed shop and the check-off system for the union in return for which the union was to call strikes when needed to enforce the association's regulation of the laundry industry, and the effect on the plaintiffs' rights of a virtual monopoly of the labor market in the laundry field were avoided by the court. See Hoffman v. Chicago Laundry Owners' Association, 297 Ill. App. 441 at 446, 17 N.E. (2d) 994 (1938). Cf. Curron v. Galen, 152 N.Y. 33, 36 N.E. 297 (1897).

98 298 Ill. App. 298, 18 N.E. (2d) 568 (1939). Note, 27 Ill. B.J. 307.

*Respondeat Superior*

The Appellate Court sustained a judgment on the basis of respondeat superior under rather unusual circumstances in *Metzler* v. *Layton*.[99] The employer defendant was a finance corporation, the employee defendant, its general manager. Plaintiff, a messenger boy, who had been sent to defendants' office on several previous occasions on business, entered the office on business during the course of a robbery. He was locked up with the manager, and after the robbers had left he and the manager freed themselves. The manager pursued the robbers with a revolver, the plaintiff following. As the plaintiff overtook the manager, the manager turned and fired, injuring him. He also fired a second time inflicting further injury. The court held that the manager was with in the course of his employment and both he and his employer were liable.

*Workmen's Compensation*

The Supreme Court decision of *Puttkammer* v. *Industrial Commission*[100] presents the common question of whether or not a given injury is compensable. The deceased, a truck driver, returning to his employer's coal yard after delivering coal, came upon the scene of an automobile accident on the highway, stopped and left his truck, and while carrying an injured child toward his truck was struck and killed by another car which collided with the wreckage. The court held that the injury "arose out of and in the course of" his employment, that his act was connected with the driving of a truck on the streets and highways, and his conduct, foreseeable, even though his object in stopping was solely to rescue the girl. Mr. Justice Wilson dissented without opinion. It may be surmised that he had difficulty in seeing a causal connection between driving a truck and the rescue of an injured child. No matter how praiseworthy such an act may be, assessing the damages therefor against the employer constitutes a type of coercive philanthropy far in advance even of the growing tendency toward broadening the liability of the employer.

[99] 298 Ill. App. 529, 19 N.E. (2d) 130 (1939).
[100] 371 Ill. 497, 21 N.E. (2d) 575 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 399.

A second case of great factual interest is that of *Kijowski* v. *Times Publishing Corporation*,[101] an Appellate Court decision. Suit was brought against the paper at common law by a boy, hired by the driver of a news truck to assist him, for injuries sustained while riding on the truck. The workmen's compensation act was pleaded as a defense, but the court held that the relationship of master and servant did not exist between the parties to the suit. The fact that the Court sustained the refusal to give an instruction denying recovery if the jury found that the newspaper knew and acquiesced in the custom of drivers to hire assistants, is weakened because justified on the ground that there was no evidence from which the jury could find such custom.

Another Appellate Court case, *Havana National Bank* v. *Tazwell Club*,[102] dealing with procedure under the compensation act, is worthy of mention. There the court held that the employer may not pursue his action against the third party for the death of an employee in the name of the personal representative of the deceased employee; also, that Section 22 of the Civil Practice Act[103] does not apply to subrogation rights of such employer, the provisions of Section 29 of the Compensation Act[104] being exclusive.

The Seventh Circuit Court of Appeals,[105] through Judge Evans, determined that an Indiana corporation, although operating under both Illinois and Indiana compensation acts, could not urge the limitations of the Illinois act upon the Plaintiff employee of an Illinois corporation who had brought a common law action against the Indiana corporation based upon injuries sustained in Indiana. The court held that any such limitation would have to be found in the Indiana act, and since the Indiana act had no provision comparable to Section 29[106] of the Illinois act, there was no basis for holding the employee to an implied agreement to abide by the Illinois statute. This appears to be a case of first impression,

101 298 Ill. App. 236, 18 N.E. (2d) 754 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 295.

102 298 Ill. App. 393, 19 N.E. (2d) 228 (1939).

103 Ill. Rev. Stat. 1939, Ch. 110, § 146.

104 Ill. Rev. Stat. 1939, Ch. 48, § 166.

105 Foster v. Denny Motor Transfer Co., 100 F. (2d) 658 (1939).

106 Ill. Rev. Stat. 1939, Ch. 48, § 166: "Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused

although an Iowa case[107] was cited as being closely in point. The inference seems to be that had the injury been sustained in Illinois, the limitation urged would have prevailed, and if Indiana had had a provision comparable to our Section 29, the plaintiff would have been bound.

In *Morris Metal Products Co.* v. *Industrial Commission,*[108] The Illinois Supreme Court has construed Section 25 of the Occupational Diseases Act[109] for what would seem to be the first time. The provision therein contained that "in cases of silicosis or asbestosis, the only employer liable shall be the last employer in whose employment the employee was last exposed during a period of sixty (60) days or more after the effective date of this act, to the hazard of such occupational disease, and in such cases, an exposure during a period of less than sixty (60) days, after the effective date of this act, shall not be deemed a last exposure . . . " was held to require only exposure during a period of sixty days and not sixty days of actual employment.[110]

## PROPERTY

### TRUSTS

Problems of trust administration occupied the attention of the Supreme and Appellate Courts during the past year. No striking changes in the law appear to have taken place, but there are several cases of some importance.

In one case, *Central Trust Company* v. *Harvey,*[111] the decree of the chancellor appointing a successor trustee was reversed for failure to consider the wishes of the beneficiaries. In this case the beneficiaries desired the appointment of a corporate trustee. Apparently, the chancellor did not

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by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

107 Henriksen v. Crandic Stages, 216 Iowa 643, 246 N.W. 913 (1933).

108 370 Ill. 292, 18 N.E. (2d) 899 (1939).

109 Ill. Rev. Stat. 1939, Ch. 48, §§ 172.1 et seq.

110 Mr. Justice Orr dissented without opinion.

111 297 Ill. App. 425, 17 N.E. (2d) 988 (1938).

hear reasons for the recommendation nor objections to the individual trustee appointed. While the selection of a successor trustee, in the absence of a power to appoint, is a matter within the chancellor's descretion, the wishes of the beneficiaries are ordinarily entitled to careful consideration. Of course the intention of the settlor and the best interests of the trust are factors which may outweigh the desires of the beneficiaries, but since harmonious relations are important to proper accomplishment of the trust purposes, the beneficiaries are entitled to be heard in the selection of a successor trustee.[112]

After a brief appearance in the Supreme Court, the case of *O'Connor* v. *Rathje*[113] reappeared on the docket of the Appellate Court for the First District.[114] The complaint asserted a cause of action under section 14 of the Dram Shop Act.[115] The defendant Rathje as trustee, had acquired title to the premises wherein the liquor was sold, through foreclosure proceedings. The complaint named as defendant Frank C. Rathje individually, and as successor trustee. A motion to dismiss was sustained as to Frank C. Rathje individually, but was denied as to Rathje as successor trustee. Thereupon the plaintiff obtained leave to file an amended complaint making "Frank C. Rathje, Successor Trustee" party defendant. The jury awarded the plaintiff $35,000 damages and the court gave judgment on the verdict. The Appellate Court reversed the judgment, holding that a trustee is liable individually for torts but is not liable in his representative capacity. In view of the fact that the trial court had dismissed the suit against Rathje individually; the court rejected a contention by the plaintiff that the words "Successor Trustee" might be treated as mere surplusage. The reason given for the nonliability of the trustee in his representative capacity was that the law will not allow the trust property to be impaired through the negligence or improvidence of the trustee.

It seems to be well settled in Illinois that a trustee is personally liable for torts committed in the course of ad-

112 Bogert, Trusts and Trustees, § 532, p. 1697; Scott, Trusts, § 108.1, p. 566.
113 368 Ill. 83, 12 N.E. (2d) 78 (1938). See 17 CHICAGO-KENT LAW REVIEW 66.
114 298 Ill. App. 489, 19 N.E. (2d) 96 (1939).
115 Ill. Rev. Stat. 1939, Ch. 43, § 135.

ministration[116] and that the trust res may not be reached directly in a proceeding at law by the injured person.[117] The first rule rests upon ordinary principles of legal liability. The trustee is actor and owner. The second rule rests upon the policy to which the court refers. In many jurisdictions it is held that the trustee cannot be sued at law in his representative capacity.[118] Logically, this result is reached because the common law does not recognize the trust as an entity nor look beyond the legal ownership of the trustee. This problem is primarily procedural.

Thus the trustee is a nonconductor of liability so far as the beneficiary is concerned and the trust res is insulated from attack in ordinary proceedings at law. There is, however, a recent tendency to permit the trust res to be reached in equity where the trustee would be entitled to be indemnified.[119] And there appears to be some tendency to hold the trustee liable at law in his representative capacity.[120]

In the instant case the difficulty seems to be that the trial court dismissed the suit against the trustee individually. The propriety of that order was apparently not before the reviewing court. Unless this erroneous order was ineffective or void, it appears that the trial court was incapable of proceeding further so far as the trustee was concerned.

The Massachusetts rule that stock dividends are to be regarded as increases to corpus was reinforced as the law of Illinois by the recent decision of the Appellate Court in the case of *Burns* v. *Hines*.[121] This case presented an interesting problem of interpretation. By the terms of the trust instrument the trustees were directed to invest and accumulate money in a separate fund until the fund amounted to $500,000. When such fund had been accumulated the trustees were to divide the fund into five equal parts and to pay the income derived from each part to certain beneficiaries.[122] The trust res consisted in large part of common

116 Restatement of Trusts, § 264; Everett v. Foley, 132 Ill. App. 438 (1907).
117 Wahl v. Schmidt, 307 Ill. 331, 138 N.E. 604 (1923).
118 Bogert, Trusts and Trustees, § 732, p. 2163.
119 Ibid., p. 2169. 120 Ibid., p. 2165.
121 298 Ill. App. 563, 19 N.E. (2d) 382 (1939).
122 "Any net income derived from said Trust Estate that may remain after paying the annuities hereinbefore provided for, including as much as may be paid annually to Loretta A. Hines during said period of five years, as well as

stock in the Edward Hines Lumber Company and shares of beneficial interest in two common law trusts. The trustees received preferred stock in the lumber company as a stock dividend and proceeded to create the $500,000 fund out of such stock. Each of the beneficiaries executed an instrument evidencing her acquiesence in the action of the trustees. Income derived from dividends on such shares was paid quarterly to the beneficiaries for ten years until June, 1931. No further payments were made because the assets of the lumber company were appropriated to the claims of its creditors. A decree holding the trustees liable for the losses suffered was reversed. The Appellate Court, in a carefully considered opinion, held that the word "money" was not used in a restrictive sense and that the trustees could properly segregate other forms of property. It was said that under the Massachusetts rule stock dividends were not income, and a recent decision of the Supreme Court of the United States was distinguished.[123] The court said that the Massachusetts rule was still the law in Illinois, citing *DeKoven* v. *Alsop*[124] as the leading Illinois case and distinguishing such cases as *Lloyd* v. *Lloyd*[125] and *Whiting* v. *Hagey*,[126] where the problem involved the distribution of stock of a separate corporation. In the absence of a manifest intention otherwise, the Massachusetts rule was regarded as controlling. The court finally held that the action of the trustees was proper under the terms of the trust instrument when properly interpreted. Although there was not a strict compliance in the sense that there was not an "investment and accumulation," still there was a compliance in spirit since the trustees could have sold

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any other money received from the sale or distribution of any of the property hereby conveyed, shall be invested and accumulated in a separate fund until such fund shall amount to Five Hundred Thousand Dollars ($500,000.00). When such sum of Five Hundred Thousand Dollars ($500,000.00) shall be accumulated the annuities hereinabove directed to be paid to the sisters and the nephew and niece of said party of the first part, shall cease, and said Trustees shall divide the said fund into five (5) equal parts, and thereafter hold one of such one-fifths parts in trust for each of the sisters of said party of the first part hereinbefore named so long as she shall live, and pay over to such sister during her lifetime the net annual income derived from such one-fifth (⅕) part."

123 Koshland v. Helvering, 298 U.S. 441, 56 S. Ct. 767, 80 L. Ed. 1268, 105 A.L.R. 756 (1936).

124 205 Ill. 309, 68 N.E. 930, 63 L.R.A. 587 (1903).

125 341 Ill. 461, 173 N.E. 491 (1930).

126 366 Ill. 86, 7 N.E. (2d) 885 (1937).

the shares and reinvested in the same stock. It was also held that an exculpatory clause would be a complete defense since there was no wilful misappropriation.

The Supreme Court, in *People* v. *Chicago Bank of Commerce*,[127] held that the owner of a special deposit, although entitled to a preferred claim against the assets of an insolvent bank, was not entitled to participate in the securities deposited by the bank with the Auditor of Public Accounts in compliance with the provisions of the Trust Company Act. This holding appears to give effect to the plain intent of the statute[128] to authorize corporations to act as trustees without giving bond and to provide protection for the beneficiaries of such trusts. The trust relationship which arises out of a special deposit may well exist where a bank is not authorized to act as professional trustee.

Two other cases are worthy of brief mention. In one case the Appellate Court for the First District held that a recital in a trust instrument that the beneficiary's interest should be considered personal property was controlling though the res was land and even though the beneficiary had power to require the trustee to execute a conveyance to him. Hence, a judgment against the beneficiary created no lien upon the land.[129]

In the other case[130] the court followed the holding in *Burton* v. *Boren*[131] that the sole beneficiary of the trust who is also the settlor has power to revoke or modify the trust at any time. This case also involved the proposition that where the settlor reserves a life interest and provides that upon his death the trust shall terminate and the property shall descend to his heirs, his prospective heirs have no interest whatever in the trust property.

### WILLS AND ADMINISTRATION

The long awaited and much needed Probate Act,[132] which became law in July, 1939, has integrated the statutes

127 371 Ill. 396, 21 N. E. (2d) 303 (1939).
128 Ill. Rev. Stat. 1939. Ch. 32. §§ 287 and 289.
129 Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank, 300 Ill. App. 329, 20 N.E. (2d) 992 (1939).
130 May v. Marx, 300 Ill. App. 144, 20 N.E. (2d) 821 (1939).
131 308 Ill. 440, 139 N.E. 868 (1923).
132 Ill. Rev. Stat. 1939, Ch. 3, §§ 151 et seq.

on Administration of Estates, Descent, Wills, Guardian and Ward, Lunatics, Idiots, Drunkards and Spendthrifts, together with portions of other acts closely related to the foregoing. Previously doubtful language has been clarified and many questions concerning administrative details have been solved.

The Supreme Court in *William* v. *Ivie*[133] laid another stepping stone at the end of those leading away from the old common law rule of wills that in the absence of an intention to the contrary expressed in the will a lapsed devise passed as intestate property rather than under the residuary clause. An exception had previously been recognized in cases where a partial or contingent interest in land was devised, leaving a reversion undisposed of, in which case such interest would pass under the residuary clause.[134] The exception seems to be not so much a case of a lapsed devise as a case of a reversion which was not disposed of by any provision of the will except a residuary clause broad enough to include it. The Williams case dealt not with an undisposed-of reversion, but with the entire interest in land which was devised to a sister who predeceased the testatrix. According to the old rule this would have been a case of a lapsed devise which would have gone to the heirs of the testatrix; but the court found language indicating an intention to make a gift over under the residuary clause if the sister were not alive to take. The devise was of all property to the testatrix's sister "if she is living" at the time of testatrix's death. The next clause gave certain of the lands to others if the sister did not survive. The land included in this clause did not cover the rest of the lands which were not disposed of otherwise unless by the residuary clause. No express language stated what would happen to these lands if the sister did not survive, nor did the residuum expressly include lapsed devises. The court infers that, since there was an intent expressed that the sister should take only if she survived, it would follow that the testatrix had in mind making a disposition on the failure of the condition, and the residuary clause would include the property undisposed of on failure of that condition. A ques-

133 371 Ill. 355, 20 N.E. (2d) 796 (1939).
134 Carter v. Lewis, 364 Ill. 434, 4 N.E. (2d) 853, 108 A.L.R. 458 (1936).

tion is raised as to how long it will be before the next stone is laid. It is only a short step now for a court to say that since it is always possible for a devisee to die before the testator, it must be presumed that the testator knows that fact and intends to make provision therefor by his residuary clause.

In *Hoffman* v. *Hoffman*,[135] the Supreme Court was again called upon to decide whether or not a deceased who wrote her own will intended her name, which appeared only in the exordium clause as her signature. The court sustained the Circuit Court, which had denied probate, holding that the proponents, although showing the intention of the deceased that the instrument should be her will, had not established the requisite proposition "that the deceased intended her name at the beginning of the purported will to be her signature to the instrument." She had neither made any statement to that effect, nor did such statement appear in the instrument itself.[136]

The Illinois Supreme Court, in reversing the Appellate Court decision in *Gartin* v. *Gartin*,[137] definitely excluded divorce as a ground for implied revocation of a will. It seems improbable that a divorced man who has been obliged to make a property settlement to his former wife would desire to leave a will in her favor, but the Supreme Court felt bound by the unambiguous language of the statute,[138] which provided the only methods of revocation that can be recognized.

Another reversal of an Appellate Court decision[139] pinned down another moot point which called for statutory construction — whether descendants who take their parent's share under the Statute of Descent[140] can be charged the debt which their parent owed the decedent. This was decided in the negative. A new query now arises as to whether

135 370 Ill. 176, 18 N.E. (2d) 209 (1938).

136 See note, 27 Ill. B. J. 350, questioning the decision.

137 296 Ill. App. 330, 16 N.E. (2d) 184 (1938), reversed in 371 Ill. 418, 21 N.E. (2d) 289 (1939). Discussed in 17 CHICAGO-KENT LAW REVIEW 97, 371.

138 Ill. Rev. Stat. 1937, Ch. 148, § 19.

139 In re Bulliner's Estate, 294 Ill. App. 189, 13 N.E. (2d) 634 (1938), reversed in Russell v. Bulliner, 370 Ill. 260, 18 N.E. (2d) 879 (1938). Notes, 17 CHICAGO-KENT LAW REVIEW 182; 52 Harv. L. Rev. 1013; 27 Ill. B.J. 277; 23 Minn. L. Rev. 975.

140 Ill. Rev. Stat. 1937, Ch. 39, § 1.

the change in language in the Probate Act of 1939[141] will affect the answer to the problem.

While it seems to have been tacitly assumed, research discloses no case in Illinois which had expressly held that a sale of personal property by the personal representative of a deceased person, without approval of court as provided by statute,[142] was valid. This has now been judicially expressed in *Equitable Life Assurance Society* v. *Mallers*[143] by the Circuit Court of Appeals for this circuit.

MORTGAGES

The familiar doctrine of *Olds* v. *Cummings*[144] received a distinct limitation in the case of *Marks* v. *Pope*.[145] The Olds doctrine, which has long been a stamping ground for lawyers and judges alike, was distinctly repudiated as to one class of negotiable instruments secured by a trust deed, when the Supreme Court held that where bonds payable to bearer and negotiable upon delivery are secured by a trust deed, the fact that the original transaction was tainted with usury will not be available as a defense in a foreclosure suit where the plaintiffs are bona fide purchasers of the bonds. The court follows the reasoning of *Peoria & Springfield Railroad Company* v. *Thompson*[146] and distinguishes between the circumstances involved in simple mortgages between individuals and those where bonds are made payable to bearer and are intended to be placed on the market. In the latter situation the court is unwilling to deny to the security for such bonds the negotiability and protection extended to any other negotiable instrument, and this protection is found to exist in the foreclosure suit as well as in the action at law. This decision, although it does not overthrow the doctrine of *Olds* v. *Cummings*, brings Illinois closer to the weight of authority and adds a new and important exception,[147] in that it protects

141 Ill. Rev. Stat. 1939, Ch. 3, § 162.
142 Ill. Rev. Stat. 1939, Ch. 3, § 92.
143 104 F. (2d) 567 (1939).
144 31 Ill. 188 (1863).
145 370 Ill. 597, 19 N.E. (2d) 616 (1939). See "Negotiability of Illinois Mortgages," 17 CHICAGO-KENT LAW REVIEW 270; also note, 27 Ill. B.J. 346.
146 103 Ill. 187 (1882).
147 Exceptions to Olds v. Cummings:
(1) That it does not apply to corporate bond issues. Peoria & Springfield

bona fide purchasers of bonds, where the same were intended to be circulated in ordinary commerce, even though the bonds were executed by private persons. The reasoning in this case might well be extended to cover practically all trust deed transactions.

The interest of general creditors in the personal property of their debtors as against chattel mortgagees has been clarified in the Appellate Court case of *Collateral Finance Company* v. *Braud*.[148] The important point established by this decision is that the protection given by Section 4 of the Chattel Mortgage Act[149] is extended at all times to all general creditors and not merely to lien creditors. Their rights as against chattel mortgagees become fixed at the date of recording, and if the mortgage was not recorded within ten days of its execution general creditors can assert priority over the mortgagee or anyone claiming through him, irrespective of whether or not the creditor's claim on the indebtedness accrued before the execution and recording of the mortgage or subsequent to it, and regardless of whether or not the mortgagee secured possession of the property prior to the judgment lien of the creditor. This point had not been theretofore ruled upon by the Illinois courts, but it is in line with an established principle protecting the interests of creditors in such circumstances.[150]

The always pertinent question of attorneys' fees received further treatment in three Appellate Court cases which are worthy of note. First, as to the recovery of attorneys' fees in foreclosure suits instituted by the holder of one of a series of notes in a split mortgage: Where the attorneys for other note

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Railroad Co. v. Thompson, 103 Ill. 187 (1882); Peacock v. Phillips, 247 Ill. 467, 93 N.E. 415 (1910).

(2) That it does not apply to accommodation paper, where that fact constitutes the ground of defense. Foreman Trust & Sav. Bank v. Cohn, 342 Ill. 280, 174 N.E. 419 (1931).

(3) That it does not apply to latent equities of third persons. Silverman v. Bullock, 98 Ill. 11 (1881).

(4) That it does not apply to collateral transactions between the mortgagor and mortgagee. Colehour v. State Savings Inst'n, 90 Ill. 152 (1878).

(5) That it does not apply to actions at law on the note. Zollman v. Jackson Savings Bank, 238 Ill. 290, 87 N.E. 297 (1909). See Reeves, Illinois Mortgages, Ch. 13; also note, 27 Ill. B.J. 340.

148 298 Ill. App. 130, 18 N.E. (2d) 392 (1938).

149 Ill. Rev. Stat. 1939, Ch. 95, § 4.

150 See notes, 17 CHICAGO-KENT LAW REVIEW 177, 27 Ill. B.J. 343.

holders have entered into the proceeding the case of *Dreger* v. *Boyer*[151] establishes the rule that the attorneys' fees allowed as a whole shall not exceed the fees which will ordinarily be allowed the plaintiff in foreclosing the entire issue and that the attorneys' fees allowed to the plaintiff should be commensurate with his interest. Illinois courts have in the past apportioned the attorneys' fees between the parties, but the rule in this case, by reducing the question to a matter of computation, is new.[152] The right of the mortgagee to foreclose the mortgage in order to recover attorneys' fees theretofore expended in an action at law, and in which action a judgment was had and paid, was sustained in the case of *Washingtonian Home* v. *Van Meter*.[153] The mortgage provided that the mortgagor "shall pay the fees, expenses and disbursements incurred or paid by the mortgagee . . . in any suit or proceeding wherein the mortgagee . . . as such, or as holder of said notes, or any of them, may be a party either as complainant, cross complainant, plaintiff or defendant, and that such fees shall be an additional lien thereunder . . . " In view of this provision, the court allowed the plaintiff to foreclose his mortgage, holding that the obligation as to attorneys' fees was as much a part of the security as was the indebtedness evidenced by the notes. This decision does not present anything new as to theory when the covenant in the mortgage is taken into consideration, and will, of course, not affect all cases where attorneys' fees are expended at law, but only where the same are secured by the terms of the mortgage. An order reducing attorneys' fees and granting other equitable relief after the decree of foreclosure and after the term had passed was upheld in principle in *Chicago Title & Trust Company* v. *Maruszczak*.[154] In this case the reasoning of the Appellate Court as to the power of a court of equity to take jurisdiction over its decrees after term time for the purpose of modifying or amending them is placed upon broad equitable grounds and is worthy of note.

Extensions between subsequent grantees of the mort-

151 297 Ill. App. 581, 18 N.E. (2d) 87 (1938).

152 17 CHICAGO-KENT LAW REVIEW 195.

153 297 Ill. App. 591, 18 N.E. (2d) 81 (1938). Note, 17 CHICAGO-KENT LAW REVIEW 197.

154 298 Ill. App. 283, 18 N.E. (2d) 738 (1939).

gagor and the mortgagee are always troublesome. Attorneys in drawing mortgages or trust deeds should keep in mind that a provision in the mortgage whereby the mortgagor covenants and agrees to pay the indebtedness according to any agreement extending time of payment will render the mortgagor liable on the indebtedness, although his grantee has assumed the indebtedness and, with or without the knowledge and consent of the mortgagor, more than one extension has been had. The foregoing was made clear by the holding in *Brosius* v. *Madsen*,[155] which clarifies the case of *Kent* v. *Rhomberg*.[156]

Two cases of general interest contain discussions with reference to the Civil Practice Act. In *Chicago Title and Trust Company* v. *Hotel Corporation*,[157] Section 50,[158] which provides that the court may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as may be reasonable, brought up the question as to acts done pursuant to order of court prior to the end of the thirty-day period. The receiver in this case had served notice that he was presenting his final account and report but did not give notice that he was going to ask for an order directing him to pay taxes. The appellant did not appear at the presentation of the final account, but, after the taxes had been paid and before the lapse of the thirty-day period, the appellant presented a petition which clearly showed that the moneys expended for taxes should have properly been applied upon the deficiency decree, and asked that the receiver be charged. The court held that the receiver was not required to wait thirty days, and that as an officer of the court his acts pursuant to order were authorized.

In *McKerchar* v. *Ayres*,[159] Sections 38 and 44 of the Civil Practice Act[160] received consideration. In this case the defendant mortgagor had a claim against the mortgagee, which

155 297 Ill. App. 94, 17 N.E. (2d) 229 (1938).

156 288 Ill. App. 328, 6 N.E. (2d) 271 (1937). In this respect, see also Chicago T. & T. Co. v. Herlin, 299 Ill. App. 429, 20 N.E. (2d) 333 (1939), dealing with similar provisions appearing in bonds.

157 300 Ill. App. 200, 20 N.E. (2d) 871 (1939).

158 Ill. Rev. Stat. 1939, Ch. 110, § 174.

159 300 Ill. App. 518, 21 N.E. (2d) 644 (1939).

160 Ill. Rev. Stat. 1939, Ch. 110, §§ 162 and 168.

he attempted to interpose as a set-off against the plaintiff assignee of the mortgage. The defendant claimed that by virtue of these sections "all cross demands may hereafter be availed of in any action, and the procedural propriety of a cross action can no longer be litigated."[161] The defendant, however, did not make the mortgagee party defendant. As this set-off fell within the well-established exception to *Olds* v. *Cummings* that no collateral transactions between the mortgagor and mortgagee may be interposed as a defense to the bona fide purchaser,[162] the court rightly held that the sections above did not apply to the foreclosure where the set-off did not exist between the parties in the proceeding.

LANDLORD AND TENANT

Three cases involving leaseholds should be noticed. It was held in *Eichenbaum* v. *State & Quincy Building Corporation*[163] that the fee owners had a right to have the lease forfeited where the court had entered a decree of foreclosure of a trust deed on the leasehold and was operating the property through a receiver, the owners having the right to have the lease declared forfeited notwithstanding a provision in the decree ordering that rents received be applied to payments of taxes. Although the court had entered a decree of foreclosure it still had jurisdiction, and since the lease was in default according to its terms and had been cancelled by the fee owners, the equity court in giving effect to the terms of the lease was not declaring a forfeiture but was only recognizing that the owners had already forfeited the leasehold.

Anticipatory damages were refused in *People* v. *West Town State Bank*,[164] where a lessor sought to recover from a bank receiver under a forty-five year lease to the bank. The receiver had abandoned the lease after taking it over, and it was held that lessor was entitled to all damages accruing up to and including the time of hearing. There being no stipulation in lease as to what amount would be considered as damages upon abandonment, it was held that anticipatory dam-

161 E. R. Sunderland, "Observations on the Illinois Civil Practice Act," 28 Ill. L. Rev. 861, 868.

162 See n. 138, supra.

163 297 Ill. App. 460, 17 N.E. (2d) 979 (1938).

164 299 Ill. App. 242, 20 N.E. (2d) 156 (1939). Note, 17 Chicago-Kent Law Review 289.

ages could not be allowed then because of lack of certainty and of proof. Otherwise final distribution of assets of the receivership would have had to be postponed for over thirty years, and the purpose of the receivership would have been defeated.

In the case of *Realty Company* v. *Chicago City Bank and Trust Company*,[165] it was held that a tenant, under a ninety-nine year lease containing a covenant for quiet enjoyment, may pay taxes and deduct the amount from rent, for the landlord is bound by his covenant to protect the tenant from all paramount claims. A proceeding for tax receivership was pending because of unpaid taxes which were liens on the property at the time the lease was given. The lessees were given authority to proceed in equity to accumulate rents and to apply them to delinquent taxes where the lessors had served notice to terminate the lease for failure to pay rent, it being shown that full rentals had been deposited with the clerk of the court to be applied to tax payments.

### TITLES

In *Saunders* v. *Saunders*,[166] a woman, who owned land as tenant in severalty, executed a deed, joined in by her husband, in which the grantors attempted to reserve to themselves a life estate. The Appellate Court held that the husband had no interest in the land upon his survival of his wife, since the only interest he had at the time of conveyance was homestead or inchoate right of dower, which rights he conveyed, and that, although he had a life estate during the life of his wife, upon her death all his interest in the premises ceased. The court's decision seems sound in theory, although contrary to dictum in earlier Supreme Court cases,[167] since a reservation cannot be made in favor of a stranger to the title at the time of the attempted reservation.

The Illinois Supreme Court, in *Naiburg* v. *Hendriksen*,[168] held that a joint tenant's contract to convey operates, in

165 299 Ill. App. 297, 20 N.E. (2d) 162 (1939).

166 300 Ill. App. 368, 21 N.E. (2d) 34 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 378.

167 DuBois v. Judy, 291 Ill. 340, 126 N.E. 104 (1920); White v. Willard, 232 Ill. 464, 83 N.E. 954 (1908).

168 370 Ill. 502, 19 N.E. (2d) 348 (1939). Notes, 52 Harv. L. Rev. 1186; 33 Ill. L. Rev. 965; 17 CHICAGO-KENT LAW REVIEW 393.

equity, as a severance of the joint tenancy, and that a conveyance by one joint tenant of his interest in land registered under the Torrens System severed the joint tenancy notwithstanding the grantee's failure to have the deed registered until after the death of the grantor.[169]

This is the first time that this precise point has been before the Illinois Supreme Court, and the opinion is well considered and will probably be followed by that court in the future.[170] Occasions may arise, however, where the joint tenancy may unwittingly be severed. In the case of *Lawler* v. *Byrne*,[171] where one of the joint tenants had conveyed her interest in the property, the court properly held the estate severed, but as a matter of dictum added that the authorities are abundant that a joint tenancy may be severed by one of the joint tenants mortgaging his interest to a stranger.

Nothing has been found to establish finally that the making of a lease by one joint tenant for a term which expires before the death of either of the joint tenants will operate to sever the estate or merely to suspend it.[172] If the language of the decision just rendered is to be followed strictly, however, and the court continues in its opinion that the making of a lease or contract severs the joint estate, the subsequent expiration of the lease or cancellation of the contract would not serve to restore the estate, as the statute is clear that the estate can be created only by language in the conveyance clearly establishing the right of survivorship.[173]

A tendency sufficiently liberal to be noteworthy was evinced by the Illinois Supreme Court in the case of *Albers* v.

169 A divorced husband, joint tenant with his former wife, conveyed to a third person, who reconveyed to the second wife of the grantor. Three days later the grantor died and the deed was not presented for registration until about thirty days later. The former wife contended that she took as survivor, but the court held that proceedings under the Torrens Act are governed by rules of equity, except as otherwise provided; also that although this was a deed of gift, it operated as a contract to convey, and that the surviving joint tenant's bare legal title was not an intervening right cutting off the grantee's equitable right to register the deed.

170 The decision follows the conclusion reached by Washburn, Real Property (5th ed.), Vol. 1, § 1, par. 11.

171 252 Ill. 194, 96 N.E. 892 (1911).

172 The making of a lease by one joint tenant has been held to work a severance in England. Roe v. Lonsdale, 12 East 39, 104 Eng. Rep. 16 (1810); Doe v. Read, 12 East 57, 104 Eng. Rep. 23 (1810).

173 Ill. Rev. Stat. 1939, Ch. 76, § 1.

*Donovan*[174] in construing a deed conveying to "Jennie Donovan and the heirs born of her body in fee simple." The court construed the words "heirs born of her body" as words of purchase, creating a class gift, rather than words of limitation, creating a fee tail, subject to the Statute of Entails.[175]

The case of *Tolley* v. *Wilson*[176] in the Supreme Court involved the construction of a will which gave to the son of the testatrix a life estate in her realty with remainder to his children and, in the event that her son should "die without issue," remainder over to her "brothers and sisters of the whole blood and their heirs share and share alike, the children of a deceased brother or sister . . . taking the share of their deceased parent." The court held that the words, "die without issue," meant "die without having had issue" and not "die without issue surviving." An interesting phase of the case is the court's use, as an aid to the determination of the intent of the testatrix, of an invalid restriction upon the children's alienation until they became twenty-five years of age. The court held that the presence of the restriction impliedly showed an intent that the children should have power to deal with the property when they reached the age of twenty-five, whether or not they survived the life tenant, their father. Thus the case was brought within the general rule that when there is an independent gift to the first taker's children, so that the children receive a vested interest, "without issue" means "without having had issue."[177]

That a highway may be established by mere use by the public as such for fifteen years is established by statute in Illinois.[178] The test as to use is not its volume but its nature, whether by the general public or by persons interested in the specific property of which the strip forms a part. In the case of *Stengl* v. *Starr Brothers*[179] the Supreme Court again had occasion to consider this question. One Owens owned two lots in Carlinville, separated by a twelve-foot public alley running east and west. In 1919 he conveyed to Starr the tract south of the alley except the north twelve feet, retaining the north

174 371 Ill. 458, 21 N.E. (2d) 563 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 381.
175 Ill. Rev. Stat. 1939, Ch. 30, § 5.
176 371 Ill. 124, 20 N.E. (2d) 68 (1939). Note, 34 Ill. L. Rev. 232.
177 Kales, Estates and Future Interests (2d ed.), §§ 539, 540, 543.
178 Ill. Rev. Stat. 1939, Ch. 121, § 152.
179 370 Ill. 118, 18 N.E. (2d) 179 (1938).

parcel and the north twelve feet of the south parcel. His title passed to Mrs. Stengl. Access to the Starr property was had over the alley and the twelve-foot strip separating the alley from the Starr lot. The court held, however, that mere travel across vacant land without objection from the owner would not suffice to enable the public to acquire a highway over it and that travel for a special purpose over unoccupied land is not the character of user required by the statute to establish a highway by prescription.

In *Carter Oil Company* v. *Myers*,[180] the Seventh Circuit Court of Appeals had before it a deed whereby Brauer and husband, the grantors, in 1932 conveyed to the People of Fayette County certain strips of land, the language used being, "grant, convey and dedicate for the purpose of a public highway." A road was promptly constructed upon the strips and gravel taken from them to build and repair highways near by. In 1936 the Brauers executed an oil and gas lease covering a tract of 120 acres including the strips conveyed in 1932, and Carter claims under this lease. In 1937 the county authorities executed to Myers a similar lease covering part of the strips purchased and not used by the highway as improved. In 1938 the Brauers made a quit claim deed to the county covering the land involved in the 1936 lease. When drilling was started under the Myer lease, Carter filed an action for injunction, which was granted, this appeal following. The court on appeal held that the deed of 1932 granted an easement only and did not convey the fee nor the oil and gas thereunder; that the conveyance to the county in 1936 was ineffective to alter the rights of Carter under the 1936 lease, that the words "grant and convey" are not incompatible with the conveyance of a lesser interest than a fee, and that the county had no interest to lease to Myers. The court also distinguishes the present case from the case presented in *Carter Oil Company* v. *Welker*,[181] which it notes is pending on appeal to the same court.

The Illinois statute on Ejectment[182] provides some small comfort to the man who is ousted from the property he bought without actual notice of a superior title, by allowing to him the value of improvements placed by him on the

[180] 105 F. (2d) 259 (1939). [181] 24 F. Supp. 753 (1938).
[182] Ill. Rev. Stat. 1939, Ch. 45, §§ 56 et seq.

land, or if the cost of improvements is more than the value of the land, to pay the holder of the better title the value of the land. In the case of *Maynard* v. *Stevens*,[183] a buyer of land in Section 15 mistakenly built his cabin in Section 22 adjoining on the south. Being ejected he sought recompense under the statute, but was denied any relief as he had no claim of title to the land on which he had erroneously built.

PERSONAL PROPERTY

In *Illinois Bell Telephone Company* v. *Slattery*,[184] the Circuit Court of Appeals held that telephone subscribers' unclaimed refunds[185] did not go to the State of Illinois by way of escheat under the old common law doctrine that the Crown was entitled to *bona vacantia*. It was stated by the court that the common-law doctrine of *bona vacantia* was too uncertain and indefinite, as applied to such unclaimed refunds, to be deemed a rule of law in Illinois, notwithstanding the Illinois statute which expressly adopted the common law. The court referred to the case of *Middleton* v. *Spicer*,[186] wherein the right of the Crown to *bona vacantia* is defined as a right to property which has no other owner. It was held that a mere debtor-creditor relation existed and that after the expiration of the period fixed by the decree for subscribers to file claims, the State could not claim the fund since the subscribers had never been owners of the fund or in any sense in possession thereof. This case is interesting in that it is an attempt to have the common-law doctrine of escheat apply to a novel and unusual factual situation.

In *Lindner & Boyden Bank* v. *Wardrop*,[187] the Supreme Court held that where one person deposits money in a bank and receives a certificate of deposit payable either to himself or to another, the title to the fund remains in the depositor, unless during his life the certificate is delivered to the other party so as to enable such other party to make withdrawal

183 370 Ill. 594, 19 N.E. (2d) 575 (1939).
184 102 F. (2d) 58 (1939). Note, 34 Ill. L. Rev. 171.
185 The "fund" arose as a result of rate litigation, finally terminating in favor of the subscribers in Lindheimer v. The Illinois Bell Telephone Co., 292 U.S. 151, 54 S. Ct. 658, 78 L. Ed. 1182 (1934). The district court had conditioned the granting of the original interlocutory injunction upon the giving of a bond by the telephone company to refund in accordance with the ultimate decision.
186 1 Brown, Ch. 201 (1783).
187 370 Ill. 310, 18 N.E. (2d) 897 (1938). Note, 27 Ill. B.J. 341.

in accordance with the terms of the certificate. The Engelbrecht case,[188] holding parties to be tenants in common under similar circumstances, was distinguished on the ground that there the circumstances indicated joint contribution to the fund, whereas here the money appeared to be exclusively that of the depositor.

## CONTRACTS

### INSURANCE

A weak attack upon the constitutionality of the Insurance Code was made in *People* v. *National Bankers Life Insurance Company*,[189] wherein the company contended that the new code[190] was unconstitutional in that it destroyed the company's franchise rights contrary to the principle announced in the Dartmouth College case, by expressly repealing former acts under which the company was originally organized. The Supreme Court could find no right of the company which had been affected, and further stated that although the company had been incorporated under a private act without reservation, still the charter was given subject to the police power, and due process was satisfied by the requirement in the code that there should be a judicial inquiry following the Auditor's (Director's) determination of the facts.

"Riot" coverage as defined in *Walter* v. *Northern Insurance Company*[191] requires that "force and violence" be present as well as two or more persons doing an unlawful act against the person or property of another. A building undergoing alteration was stealthily entered and large amounts of creosote smeared on the walls, ceilings and windows by two or more persons. The trial court found no riot, the Appellate Court considered the facts sufficient to constitute a riot, and the Supreme Court reversed the Appellate Court[192] and found no riot, and no coverage under the term. Resort was had to the Criminal Code and the common law for definitions and distinctions.

188 Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N.E. 827 (1926).
189 369 Ill. 605, 17 N.E. (2d) 579 (1938). 190 Ill. Rev. Stat. 1939, Ch. 73, § 800.
191 370 Ill. 283, 18 N.E. (2d) 906 (1939). Note, 28 Ill. B.J. 88.
192 Walter v. Northern Ins. Co., 294 Ill. App. 133, 13 N.E. (2d) 660 (1938). Note, 16 CHICAGO-KENT REVIEW 395.

The Supreme Court recently held[193] that a railway mutual benefit association, not for profit and paying only total disability and death benefits, could not be compelled to reincorporate under Section 31 of the Corporation Act of 1927, nor was it amenable to Section 15 of the Mutual Benefit Associations Act since the latter makes no provision to prevent violation of existing contracts; nor did the association come within the provisions of the Life Insurance Assessment Act of 1893 as the benefit fund accumulated was a not a reserve fund. Justice Orr dissented, not without merit, and rather clearly pointed out that Section 121 of the Insurance Code of 1937 required every company entering into contracts of insurance to have a certificate of authority from the State Director of Insurance. He further stated that since the code provides for the protection of policies previously written, there would be no impairment of contracts already in existence, but that future policies would be subject to the new contract requirements. Could Justice Orr's conclusion have been reached it would have resulted in uniformity in the application of the code provisions to all associations writing insurance contracts, which result the legislature probably desired and intended.

A problem of first impression in Illinois involving coverage and ascertainment of damages arose in *Mammina* v. *Homeland Insurance Company*[194] when an automobile truck, insured against fire, collided with a train. Considerable damage was done to the truck, which thereafter burst into flames and was consumed. Competent evidence revealed to the satisfaction of the court that the two causes of loss could be accurately determined by deciding the value of the truck immediately after the impact and the value after the fire. The losses were thereby segregated and judgment entered along ordinary rules, without recourse to more arbitrary rules[195] with respect to concurrence of different causes of loss which might have been applied in the absence of the evidence referred to.

A case of interest on the facts[196] appeared in the third

193 People v. Railway Mail Benefit Ass'n, 371 Ill. 102, 20 N.E. (2d) 91 (1939).
194 371. Ill. 555, 21 N.E. (2d) 727 (1939). 195 Phillips, Insurance, §§ 1136, 1137.
196 American State Bank v. Nat. Life Ins. Co., 297 Ill. App. 137, 17 N.E. (2d) 256 (1938).

appellate district and was there decided. Edith Neville in her life time purchased several annuity contracts for which she paid the total sum of $22,000. She was to receive monthly and quarterly payments thereafter. She died after receiving approximately only $1200. A bill filed by her executor claimed the consideration received under the annuity contracts to be so grossly inadequate as to "shock the conscience" and to constitute fraud as a matter of law; further a mutual mistake of fact as to health and expectancy. The court held that possibly a medical examination might have revealed her true physical condition but that there was no duty on the company to make it, and the assured could have had such examination had she seen fit. Further, that in the absence of allegations that the decedent was incompetent, or that actual fraud, misrepresentation, or concealment was practiced on her, or of any fiduciary relation between the parties, the bill did not state a cause of action and was therefore properly dismissed.

In *Miller* v. *Central Mutual Insurance Company*[197] an attack upon the chancellor's power to control, direct, or approve judicially the conduct of the receiver of a delinquent insurance company appointed by the Director of Insurance (since the receiver is an administrative and not a judicial officer) was disposed of by stating that the statute is satisfied by the action of the Director of Insurance in appointing the receiver, and that after decree of insolvency or delinquency and liquidation ordered, whatever is thereafter done is simply in enforcement of the decree and clearly within the power of the chancellor to approve the receiver's acts.

In construing the terms of a policy covering loss by robbery, which required the robbery to occur in the presence of a custodian of the property, the Appellate Court of the Second District[198] held that, where a closed door and a brick wall separated the thief and the custodian, who was unaware of the theft until the door was opened and the thief was in flight 125 feet away, such robbery did not occur within the policy coverage. The court stated that no Illinois case had been called to its attention where "presence," as used in an insurance

197 299 Ill. App. 194, 19 N.E. (2d) 822 (1939).

198 Grimes v. The Maryland Casualty Co., 300 Ill. App. 62, 20 N.E. (2d) 982 (1939).

policy like that under the facts of the case, had been defined, and therefore the court drew and applied the analogy of the Illinois cases regarding "in the testator's presence" in the attestation of wills.

Increasing use of the procedure of declaratory judgments[199] for determining insurance problems, and the possible avoidance of jury trials, is indicated by several cases in the federal courts of which the instant case is typical. A plaintiff insurer[200] sought a declaration that it had been relieved of liability under the indemnity insurance contract by reason of the violation of certain conditions therein by the defendant automobile owner insured. The specific risk excluded was in "respect of injuries caused in whole or in-part . . . while operated . . . by any person violating regulations governing the licensing of motor vehicle operators, or when driven by any person whose right to drive has been enjoined by proper authority or whose right to drive has been suspended or revoked." The Illinois law required the chauffeur to be registered and licensed.[201] That the chauffeur was not licensed was admitted. The district stated its conclusions of law favorable to the plaintiff insurer and the Circuit Court of Appeals affirmed the decree. No doubt greater use will be made by many insurers when the advantage is seen and the facts warrant the procedure.

## SALES

Where a conditional sales vendor incorporated in the contract a provision more likely to be found in a trust receipt: "That the proceeds of all resales shall be considered the property of the company in lieu of the goods so sold and held in trust for it . . . ," the conditional vendor claimed that this provision was good not only as to the conditional vendee but also as to a judgment creditor of the conditional vendee.[202] The proceeds of the resale by the conditional vendee were deposited by him in his bank account together

199 28 U.S.C.A. § 400.

200 Universal Indemnity Ins. Co. v. North Shore Delivery Co., 100 F. (2d) 618 (1938).

201 Ill. Rev. Stat. 1939, Ch. 95½, § 33.

202 Kilgore v. The State Bank of Colusa, 300 Ill. App. 409, 21 N.E. (2d) 9 (1939).

with his personal funds. A judgment creditor sought to reach the funds by garnishment and the conditional vendor was permitted to intervene, but the Appellate Court affirmed a judgment for the judgment creditor, saying, "To hold that a valid trust exists under the contract and circumstances in this case would invade a wholly new field for the law." In view of the recent adoption of the Uniform Trust Receipts Act in Illinois, the issue might be raised as to whether, had the case arisen after the adoption of that act, the conditional vendor's right could be recognized on the theory of a trust receipt. Assuming that it could be so classified, the entruster's right would be as provided for in Section 10 of that act. By Section 10 (a) it is contemplated that the proceeds be still in the hands of the sub-vendee, whereas here the funds had been turned over to the conditional vendee ("trustee"). Section 10 (b) comes nearest to applying, because under that section the proceeds need not be identified, but the prerequisites of that section[203] did not appear in the facts of this case. Section 10 (c) requires identifiable funds. Hence it appears that, even if the contract had been intended to be a trust receipt transaction, the judgment creditor would have prevailed.

### GUARANTY AND SURETYSHIP

The Appellate Court, in the case of *People* v. *Marx*,[204] was called upon to determine whether, under the Civil Practice Act, a surety who was sued with his principal by the ob-

203 Ill. Rev. Stat. 1939, Ch. 121½, § 175: "Where, under the terms of the trust receipt transaction, the trustee has no liberty of sale or other disposition, or, having liberty of sale or other disposition, is to account to the entruster for the proceeds of any disposition of the goods, documents or instruments, the entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows:

"(a) To the debts described in subsection three of section nine hereof; and also

"(b) To any proceeds or the value of any proceeds (whether such proceeds are identifiable or not) of the goods, documents or instruments, if said proceeds were received by the trustee within ten days prior to either application for appointment of a receiver of the trustee, or the filing of a petition in bankruptcy or judicial insolvency proceedings by or against the trustee, or demand made by the entruster for prompt accounting; and to a priority to the amount of such proceeds or value; and also

"(c) To any other proceeds of the goods, documents or instruments which are identifiable."

204 299 Ill. App. 284, 20 N.E. (2d) 103 (1939).

ligee on the bond, could in the same action file a counterclaim to recover from his principal. It was held that the surety could file such counterclaim subsequent to the answer if the court in its discretion thought proper, since to hold otherwise would be to give the act a narrow and restricted construction.

An agreement by a bank with a purchaser therefrom of certain assessment bonds was held to be unenforceable in *People* v. *Rockford Trust Company.*[205] The purchaser of the bonds, as intervening petitioner in liquidation proceedings, sought to be allowed to return the bonds and prayed that the bank or receiver for the bank be compelled to pay him the purchase price therefor, it being alleged by petitioner that the bonds were purchased with the agreement and understanding that they could be returned and exchanged for first mortgages. Relief was denied, the court holding that such was in effect a guarantee to repurchase securities sold and was therefore prohibited by statute,[206] which declares it to be unlawful for a bank or similar institution having savings deposits of trust funds to guarantee payment of any debt, which payment, if made, would jeopardize or impair the security of such deposits.

### QUASI-CONTRACTS

Whether gifts made in contemplation of marriage may be recovered upon the death of the donee, was the question presented to the court in *Urbanas* v. *Burns,*[207] and answered in the negative. The court conceded that a right to specific restitution of such gifts might be permitted where the donee wilfully breached the contract to marry, but denied that the right to recover exists where the marriage fails to take place through no fault of the donee. Restitution in specie for fraud or wilful breach by the donee would be allowed only, the court emphasized, in the case of gifts "intimately connected with the marriage," such as rings and heirlooms. The only other Illinois case discovered on this precise point was *Rockafellow* v. *Newcomb,*[208] in which recovery of land con-

205 296 Ill. App. 582, 16 N.E. (2d) 822 (1938).
206 Ill. Rev. Stat. 1939, Ch. 38, § 64.
207 300 Ill. App. 207, 20 N.E. (2d) 869 (1939).
208 57 Ill. 186 (1870).

veyed by the plaintiff to his fiancée in contemplation of marriage was allowed upon the wilful refusal of the donee to marry the plaintiff. The Restatement of Restitution[209] suggests that gifts may be made conditional upon the marriage of the donor and donee but that this is not ordinarily the case except perhaps where the gifts are of considerable size or carry an intent of sole or primary use after marriage, such as land, furniture, and bank accounts. Under the Code Napoleon, literally copied into the Louisiana Civil Code, "every donation made in favor of marriage falls if the marriage does not take place."[210] The effect of this provision is to make such gifts void if marriage, the ultimate purpose of the gifts, does not occur.

In *Kippen* v. *Kippen*,[211] the plaintiff, a sister of the defendant, was given a judgment for the reasonable value of services rendered in supporting the defendant's three minor children in her home for a period of several years. Although the defendant and his children had lived for several years after the death of the children's mother in the same household with the plaintiff, the court held that no presumption arose that the services were rendered gratuitously as the prompting of affection. The law will imply a promise by one to reimburse another for expenditures in discharging the former's duty to support minor children, the court declared. The problems involved in determining the right to recover for services rendered in behalf of another without request were hardly touched upon by the opinion, and practically nothing seems to have been decided in Illinois on this point.[212]

MISCELLANEOUS

Where banks had, contrary to public policy, pledged assets to secure deposits, two Illinois Appellate cases[213] held that there was a conversion as of the time of the deposit so

209 § 58, comment C.

210 Wardlaw v. Conrad, 18 La. App. 387, 137 So. 603 (1931).

211 301 Ill. App. 178, 21 N.E. (2d) 906 (1939).

212 Ordinarily where necessaries are furnished there is a presumption that payment is intended, but proof of a sufficiently close blood or family relationship will either rebut this presumption or raise a presumption that the plaintiff intended to render the services gratuitously. 11 L.R.A. (N.S.) 873.

213 Albers v. Continental Bank & Trust Co., 296 Ill. App. 592, 17 N.E. (2d) 66 (1938) and 296 Ill. App. 596, 17 N.E. (2d) 67 (1938).

that the statute of limitations on cause of action for recovery thereof would begin to run as of that time even though no demand were made therefor until some time later. In a federal court case for the seventh circuit,[214] where the court was called upon to determine from what time interest would accrue on such an illegal deposit, it was said, "Here the money was voluntarily paid to the city and, though this was improper under the law, it seems to us, in view of the honest belief of the comptroller, the receiver and the bank to the contrary, it cannot be that it was illegally withheld until demand was made for repayment." In view of the fact that the pledged securities were not regarded by the parties as held by the pledgee adversely before default in payment of the deposit or at least before discovery of the illegality,[215] the conversion should be regarded as having taken place no sooner. The time of conversion would be the time from which both limitation on action and interest should run.

A new ground of discharge of a contract by impossibility was added in *O'Hern* v. *De Long*[216] when the court said that dissolution of an insurance company by order of the insurance director excused the company from its executory obligation to pay renewal commissions to an insurance agent. The impossibility was not in the company's ability to pay the commissions but in the ability to receive premiums on which the payment of commissions depended. When a condition precedent becomes impossible it is not usually excused and so on its failure to occur no liability arises. But an exception exists where the promisor himself makes the condition impossible. In other cases insolvency has been treated as a status which in point of law has been self-imposed.[217] In this view, a defense of failure of a condition would be untenable. The present case may, therefore, presage either a distinc-

214 La Parr v. The City of Rockford, 100 F. (2d) 564 (1938).

215 Such agreements were not held to be illegal until the deposits mentioned in the Illinois Appellate Court cases, supra, were made. Sneeden v. The City of Marion, 64 F. (2d) 721 (1933), affirmed in City of Marion v. Sneeden, 291 U.S. 262, 54 S. Ct. 421, 78 L. Ed. 787 (1934). People v. Wiersema State Bank, 361 Ill. 75, 197 N.E. 537 (1935).

216 298 Ill. App. 375, 19 N.E. (2d) 214 (1939).

217 See Western Drug Supply & Specialty Co. v. Board of Administration of Kansas, 106 Kan. 256, 187 P. 701, 12 A.L.R. 1074 (1920); 17 CHICAGO-KENT LAW REVIEW 279.

tion between voluntary and involuntary dissolution or an abandonment of the view that a dissolution based on insolvency is legally self-induced.

## TORTS

The decision of the Appellate Court, reported in last year's survey, holding the city of Chicago liable for injuries received by a person as a result of a fall upon an ice covered safety island, was reversed by the Supreme Court in *Strappelli* v. *City of Chicago*.[218] The Supreme Court was not convinced that the development of uneven ridges of ice on the island due to thawing and freezing imposed upon the city any greater degree of care than it was required to exercise elsewhere in the safeguarding of streets and sidewalks from dangerous hazards.

In *Bryan* v. *City of Chicago*,[219] the court upheld the constitutionality of a statute[220] authorizing recovery against municipalities for the negligent operation of fire trucks. The approving opinion cites a number of decisions in other jurisdictions reaching the same conclusion with reference to the validity of legislative efforts to extend the liability imposed upon municipalities for torts committed in the field of governmental activities.

The immunity of park districts from liability in tort was reaffirmed in the case of *Le Pitre* v. *Chicago Park District*,[221] involving a claim for personal injuries arising out of a collision between a car and an unlighted light post on a park boulevard. Park districts are created solely to perform governmental functions, the court said, and enjoy the same immunity from liability in tort as cities and villages in the maintenance of parks. *Costello* v. *City of Aurora*,[222] discussed in last year's survey, holding a city liable for personal injuries arising out of the negligent maintenance of a park, was not the law, the court declared.[223]

218 371 Ill. 72, 20 N.E. (2d) 43 (1939).
219 371 Ill. 64, 20 N.E. (2d) 37 (1939).
220 Ill. Rev. Stat. 1939, Ch. 70, § 9.
221 299 Ill. App. 263, 20 N.E. (2d) 111 (1939). Note, 33 Ill. L. Rev. 974.
222 295 Ill. App. 510, 15 N.E. (2d) 38 (1938).
223 For citations in this field indicating that the Costello case is not in accord with Supreme Court decisions in this state, see 17 Chicago-Kent Law Review 50.

The statutory requirement[224] that notice must be given to city or village officials within six months after an accident which forms the basis for a suit against such city or village, is not complied with by a notice which gave the place of accident one-quarter of a mile from the correct scene, the court held in *Keller* v. *Tomaska*.[225] The notice must be sufficiently accurate, the court declared, to enable the city or village authorities, by the exercise of reasonable diligence, to locate the scene of the accident. The court referred to the holding in *Ouimette* v. *City of Chicago*,[226] to the effect that the sufficiency of a notice as a prerequisite to the maintenance of a personal injury suit against a city is to be determined by the notice itself, and one giving a defective notice is not aided by the fact that the city may have received accurate knowledge of the location of the accident from other sources.

In *Parker* v. *Kirkland*[227] we have an interesting problem in the extent of privilege in defamation. In the course of a proceeding before the Cook County Board of Tax Appeals, brought by a former employee of the Tribune Company for the purpose of effecting assessment of capital stock tax of that company for the years 1872 to 1934 as omitted property,[228] the defendant, counsel for the company, characterized the plaintiff as "just a contemptible falsifier" and "contemptible blackmailer," and stated that "his sole purpose is of blackmailing the Chicago Tribune Company." The Appellate Court held the statements privileged, as being pertinent to the inquiry. The further remarks, "he is a rat" or "a dirty rat" and that "he ought to be taken for a ride," while characterized by the court as "ill chosen and harsh," were not justified as pertinent and privileged, but were held not to constitute actionable slander as not being defamatory *per se*. The decision contains an excellent discussion of the nature of the Board of Tax Appeals, with the ultimate conclusion that it is a quasi-judicial body, and hence that proceedings before it are privileged.

In *Francis* v. *Humphrey*[229] the District Court for the

224 Ill. Rev. Stat. 1939, Ch. 70, § 7.
225 299 Ill. App. 34, 19 N.E. (2d) 442 (1939).
226 148 Ill. App. 505 (1909). 227 298 Ill. App. 340, 18 N.E. (2d) 709 (1939).
228 See 17 CHICAGO-KENT LAW REVIEW 63.
229 25 F. Supp. 1 (1938).

Eastern District of Illinois solved a challenging problem of substance and procedure and the application of the new Federal Rules of Civil Procedure. A motion was sustained to dismiss a personal injury complaint which failed to allege freedom from contributory negligence as required under Illinois law.[230] The plaintiff contended that Rule 8 (c) of the Federal Rules of Civil Procedure makes contributory negligence an affirmative defense, and so relieves him of the burden of alleging freedom therefrom.[231] The court held that the matter was one of "substance," and that in any case where the Rules abridge or modify substantive rights given under state law, they are to that extent void, in accordance with *Erie Railroad* v. *Tompkins*.[232]

In *Smith* v. *Luckhardt*,[233] the Appellate Court has followed the well-settled law of Illinois,[234] that an action cannot be maintained by a living child for pre-natal injuries, nor by the administratrix of such child after its death. The case is interesting because of the frank challenge to the court to change the law, and the appearance of two well reasoned comments on the case supporting that challenge.[235]

Although the Illinois courts have handed down numerous other decisions containing clear and informative statements concerning absence of degrees of negligence,[236] liability for vicious animals,[237] attractive nuisance,[238] municipal liabil-

230 See Urban v. Pere Marquette R. Co., 266 Ill. App. 152 (1930).

231 Federal Rules of Civil Procedure, Rule 8:

"(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

232 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938). See note on the principal case, 27 Georgetown L.J. 375; also a comment on the general problem in 37 Mich. L. Rev. 1249.

233 299 Ill. App. 100, 19 N.E. (2d) 446 (1939).

234 Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

235 27 Ill. B. J. 348; 87 U. of Pa. L. Rev. 1016.

236 Schmidt v. Anderson, 301 Ill. App. 28, 21 N.E. (2d) 825 (1939).

237 Happke v. Huston, 301 Ill. App. 191, 22 N.E. (2d) 124 (1939).

238 Cicero State Bank v. Dolese & Shephard Co., 298 Ill. App. 290, 18 N.E. (2d) 574 (1939).

ity,[239] false arrest,[240] malicious prosecution,[241] fraud and deceit,[242] and *res ipsa loquitur*,[243] such expressions are merely cumulative of earlier decisions and so not deemed worthy of further particular mention.

## CRIMINAL LAW AND PROCEDURE

The legislature added to the list of prohibited acts by placing five new offenses on the criminal calendar: (a) The possession of the seeds of certain noxious weeds with intent to disseminate the same is punishable;[244] (b) the manufacture, possession, storage, transportation, sale, or gift of explosives is subjected to extensive regulation;[245] (c) it is criminal to trespass on the land of another, whether enclosed or not, after permission to enter has been denied, or a request to depart has been made;[246] (d) the scope of the act regullating the manufacture and possession of narcotic drugs—to overcome the effect of the decision in *People* v. *Sowrd*[247]—has been enlarged to include the possession of all parts of the marijuana plant;[248] and (e) a new act relating to the obstruction of navigable waters by watercraft, with criminal penalties, has been adopted.[249]

At the same time the courts were also engaged in clarifying the criminal law of the state. It has now become established that one who fills up a signed blank check in an unauthorized fashion is guilty of the crime of forgery just as well as one who alters an existing instrument.[250] Likewise,

239 Koch v. City of Chicago, 297 Ill. App. 103, 17 N.E. (2d) 365 (1938); Kellems v. Schiele, 297 Ill. App. 388, 17 N.E. (2d) 604 (1938).

240 People v. Euctice, 371 Ill. 159, 20 N.E. (2d) 83 (1939).

241 Sheffield v. Cantwell, 101 F. (2d) 351 (1939).

242 People v. Central Republic Trust Co., 300 Ill. App. 297, 20 N.E. (2d) 999 (1939).

243 Styburski v. Riverview Park Co., 298 Ill. App. 1, 18 N.E. (2d) 92 (1938); Smith v. Illinois Power & Light Co., 297 Ill. App. 358, 17 N.E. (2d) 632 (1938).

244 Ill. Rev. Stat. 1939, Ch. 38, § 89, as amended by Laws 1939, p. 501.

245 Ill. Rev. Stat. 1939, Ch. 93, § 143-156, added by Laws 1939, p. 508, repealing Ill. Rev. Stat. 1937, Ch. 38, § 229-235, which carried more severe penalties.

246 Ill. Rev. Stat. 1939, Ch. 38, § 565, as amended by Laws 1939, p. 514. The request may be made orally or by posting signs.

247 370 Ill. 140, 18 N.E. (2d) 176 (1938), reversing 295 Ill. App. 314, 14 N.E. (2d) 957 (1938). Note, 37 Mich. L. Rev. 1325.

248 Ill. Rev. Stat. 1939, Ch. 38, § 192.1-192.28, as amended by Laws 1939, p. 498.

249 Ill. Rev. Stat. 1939, Ch. 19, §§ 47a-47e, added by Laws 1939, p. 515.

250 People v. Kubanek, 370 Ill. 646, 19 N.E. (2d) 573 (1939), in which the court refused to follow People v. Kramer, 352 Ill. 304, 185 N.E. 590 (1933).

a valid conviction of conspiracy must depend on the conviction of not less than two persons, so that if only one defendant has been tried and found guilty, sentence of such person must await the outcome of the trial of the other alleged offender.[251] So, too, a public official may be prosecuted for failure to turn over the funds of his office only if the demand therefor is made by the person legally entitled thereto, who may or may not be his successor in office.[252] Of similar interest is the decision in *United States* v. *About 151.682 Acres of Land*[253] which limits the power of the government, in forfeiture proceedings, to the seizure of only those premises actually used in the illegal enterprise, which may or may not be coextensive with the natural boundaries thereof.

Other scattered problems in the field of criminal procedure have also received consideration, either legislative or judicial. Thus an indictment for malicious mischief must be endorsed to show the name of the prosecutor,[254] but this statutory requirement was deemed satisfied in *People* v. *Novotny*[255] by the presence of the name of a prosecutor, even though such person was not the owner of the property damaged. The time within which prosecution of public officials for embezzlement of public funds may be commenced has been extended by omitting the period of the term of office from the statutory period of limitation.[256] The action of the Appellate Court in reversing a decision for the defendant on a motion to quash an indictment will hereafter require the defendant to stand trial on the indictment before he can secure a ruling on such action by the Supreme Court.[257]

251 People v. Levy, 299 Ill. App. 453, 20 N.E. (2d) 171 (1939), in which the judgment was reversed, despite the court's satisfaction as to the defendant's guilt, because the record failed to show the outcome of the trial of a codefendant to whom a severance had been granted, on the ground that without the conviction of the latter, the crime of conspiracy would be a legal impossibility.

252 People v. Jochums, 369 Ill. 348, 16 N.E. (2d) 894 (1938). Conviction of clerk of circuit court reversed because demand made by successor in office, when it should have been made by county treasurer. People v. Anderson, 342 Ill. 290, 174 N.E. 391 (1931), distinguished on facts. Language of Ill. Rev. Stat. 1939, Ch. 38, § 460, qualified.

253 99 F. (2d) 716 (C.C.A. 7th, 1938). See note in 17 CHICAGO-KENT LAW REVIEW 185.

254 Ill. Rev. Stat. 1939, Ch. 38, § 717.

255 371 Ill. 58, 20 N.E. (2d) 34 (1939).

256 Ill. Rev. Stat. 1939, Ch. 38, § 632a, added by Laws 1939, p. 507.

257 People v. McArdle, 370 Ill. 513, 19 N.E. (2d) 328 (1939), dismissing writ of error on ground of lack of jurisdiction because no "final order" disposing of the rights of the parties was involved.

Power to grant probation to persons convicted of forcible rape is hereafter denied the trial court.[258] Male juvenile offenders up to the age of nineteen years may, in the discretion of the trial court, be confined in the Illinois State Training School for Boys instead of the penitentiary.[259] The treatment of convicted persons who subsequently become insane is now to be handled differently in cases where the punishment is imprisonment in places other than the penitentiary or reformatory. The offender, upon restoration of sanity, is now to be discharged if the original period of the sentence has expired.[260] The handling of the cases of penitentiary inmates who become insane subsequent to sentence and commitment is continued as heretofore.[261]

The chances of a convicted offender securing discharge on habeas corpus proceedings seem lessened by the action taken in two significant cases. In *People* v. *Circuit Court of Will County*[262] it was emphatically announced that such relief cannot be granted where the conviction has been reviewed and affirmed on writ of error, and that while the several courts of the state possess concurrent original jurisdiction in habeas corpus proceedings this is not true after appellate jurisdiction of the case has been assumed by higher tribunals. The use of the writ of habeas corpus in lieu of a writ of error was likewise condemned in *People* v. *Hunter*[263] in which case, through mistake, a defendant had been convicted of robbery "as charged in the second count in the indictment," whereas, in fact, there was only one count. It was held that the writ would not lie where the trial court had jurisdiction of the subject matter and the person of the defendant, since in such case its judgment at worst would be voidable only and not void, preventing any collateral attack thereon.

258 Ill. Rev. Stat. 1939, Ch. 38, § 785, as amended by Laws 1939, p. 502.

259 Ill. Rev. Stat. 1939, Ch. 38, § 803, as amended by Laws 1939, p. 496. The earlier statute had fixed the age limit at sixteen.

260 Ill. Rev. Stat. 1939, Ch. 86, § 47, 48, added without Governor's approval, Laws 1939, p. 703.

261 Ill. Rev. Stat. 1939, Ch. 38, § 593, and Ch. 108, § 113.

262 369 Ill. 438, 17 N.E. (2d) 46 (1938).

263 369 Ill. 427, 17 N.E. (2d) 29 (1938). See also United States v. Ragen, 102 F. (2d) 184 (1939), in which relief was sought from a conviction in the Illinois state court on a two-count indictment, the second count of which had been stricken, and the proceedings resulted in an erroneous judgment on the stricken count when it should have been on count one. Held, writ of habeas corpus denied.

## REMEDIES

### EQUITY

The First District Appellate Court held recently that seniority rights of railroad employees were property rights enforceable in a court of equity.[264] The opinion of Mr. Justice Matchett reviewed the conflicting authorities in other states and noted that the case was one of first impression in Illinois. Where interests and rights have come to have sufficient definition to be afforded legal recognition, courts of equity tend to be less restrictive in the use of the term "property right." It was pointed out years ago that a property right in any technical and restricted sense of the term was not essential to the existence of equitable jurisdiction in spite of frequent expressions by courts and text writers to the contrary.[265] Employment of a technique of stamping new rights with the "property-right" seal of approval has resulted in an expanded sphere of equitable protection. It may be queried whether the time has not come to abandon this technique in favor of an exposition of the problems and policies which always underly the question of extending equitable relief. Rights having positive pecuniary value have come to be included within the meaning now assigned to the term "property right." In the Ledford case, the court was justified in looking upon seniority rights as "property rights" in this sense.

The doctrine of election of inconsistent remedies was examined by the Supreme Court in the case of *Fleming* v. *Dillon*.[266] In a suit for specific performance of an oral contract to devise real and personal property in return for care and services, it was urged that the plaintiff must fail because she had filed a claim for the value of her services against the estate of the promissor. The court held that the remedies were coexistent. Since the plaintiff had not received satisfaction, there was no prejudice to the defendant heirs in allowing the suit for specific performance. This holding seems a just one in view of the fact that equity requires clear and

264 Ledford v. Chicago, M., St. P. & P. R. Co., 298 Ill. App. 298, 18 N.E. (2d) 568 (1939). Note, 27 Ill. B. J. 307.

265 R. Pound, "Equitable Relief Against Defamation and Injuries to Personality," 29 Harv. L. Rev. 640; J. R. Long, "Equitable Jurisdiction to Protect Personal Rights," 33 Yale L. J. 115.

266 370 Ill. 325, 18 N.E. (2d) 910 (1939).

convincing proof of the existence of such contracts before specific performance will be granted. It is sometimes true that meritorious claims do not succeed because of the difficulties of proof that are inherent in such transactions. Such a claimant would be greatly prejudiced by being forced to elect whether to file a claim against the estate or to sue for specific enforcement of the promise.

The problem of the degree of certainty required for the equitable enforcement of a contract was considered in an interesting opinion of the Circuit Court of Appeals in the case of *Hazeltine Corporation* v. *Zenith Radio Corporation.*[267] In a patent infringement suit, the defendant claimed to be equitably licensed to manufacture under the patent by virtue of a contract whereby the plaintiff agreed to renew the defendant's existing license by executing a new standard form of license which had not then been adopted. It was agreed that the defendant should receive the lowest rate of royalty granted to any other licensee. The plaintiff thereafter adopted a new standard form of agreement. The court held that the agreement was sufficiently certain to be enforcible. As a general rule, where essential terms of a contract are left to be determined by the will or choice of one of the parties, a court of equity cannot grant specific performance. But where that choice is exercised, the resulting terms become a part of the contract and the uncertainty is removed.[268]

The Appellate Court for the First District held that Section 72 of the Civil Practice Act,[269] abolishing the writ of error coram nobis and substituting a proceeding by motion, applied to equity cases.[270] Previous cases had not positively determined the question.[271] This case suggested but did not settle the problem of the relation between law and equity under the Illinois Act.[272]

EVIDENCE

Two significant cases in the field of search and seizure

267 100 F. (2d) 10 (C.C.A. 7th, 1938).
268 See note in 23 Minn. L. Rev. 675 (1939).
269 Ill. Rev. Stat. 1939, Ch. 110, § 196.
270 Frank v. Newburger, 298 Ill. App. 548, 19 N.E. (2d) 147 (1939).
271 Maniatis v. Carelin, 287 Ill. App. 154, 4 N.E. (2d) 654 (1936). See note, 17 CHICAGO-KENT LAW REVIEW 276.
272 See comment in 27 Ill. B. J. 284, and letter of Mr. Justice O'Connor, 27 Ill. B. J. 313.

were decided during the year. *People* v. *Lind*[273] required the Supreme Court of Illinois to determine for the first time whether a wife is able to waive her husband's constitutional immunity against search of his dwelling. The husband at the time was in jail and police officers without a search warrant came to the premises to search for stolen property. After obtaining consent from the wife under such circumstances that it cannot be said that the consent was freely given, the police officers searched the premises and found incriminating evidence. A failure of the trial court to suppress the evidence on motion made resulted, after conviction, in the case being reversed and remanded. The Supreme Court reviewed the authorities on the question involved and the facts, and finding no precedent in Illinois, followed the decisions of the majority of other jurisdictions.[274]

In *People* v. *Dent*,[275] the court applied the rule to third parties in general, holding that the invitation of another than the owner for officers to enter premises without a search warrant must be extended under specific authorization. It was papers used in the "policy game" which were here seized, papers which were on a table in plain view of the defendant, and the invitation to enter was given in the presence of the defendant. Although no trick or deception was actually used, the court seemed to feel that the consent, even if imputable to the owner, was "fraudulent," and the entrance illegal. It is perhaps not surprising that three justices dissented vigorously.

Until the present year, Illinois, practically alone of all the states, has required the proof of the commission of a felony beyond a reasonable doubt in a civil suit where the crime alleged constitutes the cause of action or the defense. Until 1925 the rule included misdemeanors, but by *Rost* v. *Noble & Company*[276] the reasonable doubt rule was confined to felonies. Now, by *Sundquist* v. *Hardware Mutual Insurance Company*,[277] the reasonable doubt rule has been consigned to limbo in civil cases and a preponderance of the evidence

273 370 Ill. 131, 18 N.E. (2d) 189 (1938). Note, 6 U. of Chi. L. Rev. 503.

274 The court relied particularly upon State v. Lindway, 131 Ohio St. 166, 2 N.E. (2d) 490 (1936).

275 371 Ill. 33, 19 N.E. (2d) 1020 (1939).

276 316 Ill. 357, 147 N.E. 258 (1925).

277 371 Ill. 360, 21 N.E. (2d) 297. Note, 17 CHICAGO-KENT LAW REVIEW 371.

will suffice. The opinion cites the authorities at considerable length and states that in England the rule arose no doubt because in that country when a finding of guilt of crime occurred in a civil suit a prosecution could immediately follow without the intervention of a grand jury. Since the reason for the original English rule was never applicable in this state, and since our Supreme Court feels it to be doubtful if the rule is still in force in England, it seems high time to pry out this mossy obstruction to civil justice.

Of less importance, but interesting because the situation is a rarity, is the case of *Bezouskas* v. *Kruger*,[278] involving reputation for care in the absence of eye witnesses. Evidence as to the deceased's habits of using care when crossing streets was stricken from the record in the trial of a cause for wrongful death, since there was no evidence whatever of any negligence on the part of the defendant, and the evidence offered of careful habits on the part of the deceased would have been useless in the case. The Appellate Court based its decision on the holding in *Casey* v. *Chicago Railways Company*.[279]

### CIVIL PRACTICE

Action by the legislature and by the courts, under the rule-making power[280] as well as by decision, has produced several innovations in the realm of pleading and procedure. Thus the troublesome problem of acquiring jurisdiction over a party whose whereabouts are unknown and whose very existence is even in doubt has been remedied by permitting service by publication as though he were dead, leaving unknown heirs to represent him.[281] Venue in divorce cases has been noted elsewhere,[282] but of like interest is a change permitting confession of judgment in "any country in which is located any property, real or personal, owned by any one

278 298 Ill. App. 462, 19 N.E. (2d) 116 (1939).

279 269 Ill. 386, 109 N.E. 384 (1915).

280 The amended rules of the Supreme Court of Illinois, effective as of August 1, 1938, may be found in 370 Ill. 13. The revised procedure for the district courts of the United States is also in operation. Extensive comment thereon having already appeared, further comment is unnecessary.

281 Ill. Rev. Stat. 1939, Ch. 110, § 153 (Civil Practice Act, § 29) as amended by Laws 1939, p. 832.

282 See note 80, supra.

or more of the defendants."[283] The old concept that no infant may be bound by judgment unless represented by a guardian ad litem seems to have yielded slightly so that now the defect may not be availed of without a showing that some injustice has been done by the failure to appoint such guardian ad litem, though the wise practitioner will still doubtless secure the appointment of proper representation for infant parties.[284]

The pleading sections of the Civil Practice Act appear to be well understood by the bar, but the use and function of the counterclaim has produced some problems. Section 38 of the act provides that "the counterclaim shall be a part of the answer . . ."[285] and seems to intimate that the two, answer and counterclaim, should be filed simultaneously. This section, however, has been construed in *People* v. *Marx*[286] to allow the filing of a counterclaim at any time prior to judgment in the original proceeding. The fundamental proposition that an answer will not suffice to secure affirmative relief, making the use of the counterclaim essential, is reiterated in *Chicago Title and Trust Company* v. *Herlin*,[287] apparently the first such decision under this point, where the court followed the older practice regarding the use of cross-bills in equity. The function of a reply, especially to overcome the defense of release, is well illustrated in *Roggenkamp* v. *Marks*,[288] as well as the necessity for the return, or at least tender of, the amount received for the release.

The provision for two motions to dismiss has also produced some confusion. The motion under Section 45 of the

283 Ill. Rev. Stat. 1939, Ch. 110, § 174(5) (Civil Practice Act, § 50) as amended by Laws 1939, p. 830. Hitherto venue in such cases was confined to counties (a) in which the obligation sued on was executed, or (b) where one or more of the defendants resided. See Ill. Rev. Stat. 1937, Ch. 110, § 174, the provisions of which continue in the amended act.

284 Zielinski v. Pleason, 299 Ill. App. 594, 20 N.E. (2d) 620 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 383.

285 Ill. Rev. Stat. 1939, Ch. 110, § 162.

286 299 Ill. App. 284, 20 N.E. (2d) 103 (1939). The case also discloses the view that the surety when sued with the principal may present a conditional counterclaim for indemnity in case judgment in the original action should run against the surety and he be compelled to satisfy the same. Heretofore a separate action would have been necessary unless the suit proceeded in equity.

287 299 Ill. App. 429, 20 N.E. (2d) 333 (1939).

288 299 Ill. App. 209, 19 N.E. (2d) 828 (1939). See comment thereon in 17 CHICAGO-KENT LAW REVIEW 275, and on same problem in 17 CHICAGO-KENT LAW REVIEW 93.

Civil Practice Act[289] operates like the old common law general demurrer in many respects. Action on one such motion, however, does not seem to preclude the presentation of a similar motion, especially if the decision in the first instance produced a mere interlocutory order.[290] The other motion under Section 48[291] is analogous to the common law "speaking" demurrer and may supply necessary information not already in the pleading record. Where such extraneous matter is to be introduced the pleader must be sure to attach an affidavit verifying the truth thereof. Failure so to do will lead to denial of the motion.[292] When such motion is properly presented, plaintiff may file counter-affidavits, and if the issue thus presented is one of fact, and the action is one at law and a jury trial has been demanded, the court must summarily deny the motion. Any rule of court which attempts to give the court power to pass upon the motion in such a case would be unconstitutional,[293] and there can be no interim jury trial to determine the disputed point in advance of the regular trial on the issues made by complaint and answer.[294]

Enforcement of judgments has been both aided and hampered. Statutory enactment now authorizes the sale of real estate free from the inchoate right of dower in the spouse of the married owner, whose right is now shifted to the proceeds of sale and is to be satisfied therefrom.[295] A change in the manner of securing execution against the person in

289 Ill. Rev. Stat. 1939, Ch. 110, § 169.

290 Municipal Employees Ins. Association v. Taylor, 300 Ill. App. 231, 20 N.E. (2d) 835 (1939), was an action in equity for rescission. Defendant's first motion to dismiss was denied and defendant was ordered to plead over. Instead of so doing, defendant filed a second motion to dismiss and this, though filed without leave of court, was sustained and plaintiff's action was dismissed for want of equity. Held: defendant might, in court's discretion, be allowed to present a subsequent motion even though it rested, apparently, on the same grounds.

291 Ill. Rev. Stat. 1939, Ch. 110, § 172.

292 Budlong v. Los Angeles Bible Institute, 296 Ill. App. 552, 16 N.E. (2d) 810 (1939). Note, 27 Ill. B.J. 209.

293 Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523, 19 N.E. (2d) 363, 120 A.L.R. 1395 (1939), holding paragraph 3 of Rule 111 of the Municipal Court of Chicago void as an unconstitutional attempt to deprive a party of his right to trial by jury.

294 Fitzpatrick v. Pitcairn, 371 Ill. 203, 20 N.E. (2d) 280 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 372.

295 Ill. Rev. Stat. 1939, Ch. 77, § 14a, added by Laws 1939, p. 690, filed without governor's approval July 25, 1939. The rights of creditors superior to the inchoate right of dower are not affected.

cases involving malice was noted in *Miles* v. *Glad.*[296] Revival of judgments may now be secured by affidavit in the fashion suggested by an amendment to the Limitations Act.[297] A motion in the nature of the writ of error coram nobis may now be secured both at law and in equity.[298]

The problem of securing appellate review still engages attention. It is now settled that Rule 34 of the Illinois Supreme Court does not require service of notice of appeal on defaulted parties, first by decision of the Supreme Court,[299] and subsequently, by amendment of the Rule itself.[300] Where required, the service upon counsel of the notice of appeal may occur either before or after the filing of the original notice in the trial court so long as it occurs within the five-day period.[301] Such notice of appeal is jurisdictional, however, and must appear in the record transmitted to the appellate court within the appeal period. If it does not, and no additional record is filed to correct such omission, the appeal will be dismissed for lack of jurisdiction.[302] Relief from such seemingly arbitrary action may, however, be indicated by the decision in *Melsha* v. *Johns-Manville Sales Corporation,*[303] where, though the appeal had been dismissed for failure to file a transcript of record in apt time, an appeal was nevertheless allowed under Section 76 of the Civil Practice Act.[304] The finding of fact by the Appellate Court in cases tried without a jury is still final and conclusive and may not be

296 299 Ill. App. 185, 19 N.E. (2d) 844 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 278.

297 Ill. Rev. Stat. 1939, Ch. 83, § 24b, added by Laws 1939, p. 702.

298 Frank v. Newburger, 298 Ill. App. 548, 19 N.E. (2d) 147 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 276; 27 Ill. B.J. 284, 313.

299 Kaminskas v. Cepauskis, 369 Ill. 566, 17 N.E. (2d) 558 (1938). For the previous conflict in the Appellate Court holdings, see 17 CHICAGO-KENT LAW REVIEW 175.

300 Before amendment, the Rule provided: "A copy of the notice by which the appeal is perfected shall be served upon each appellee and upon any co-party who does not appear as appellant. . . ." Ill. Rev. Stat. 1937, Ch. 110, § 259.34. As amended the Rule requires service of notice only upon parties "who would be adversely affected by any reversal or modification of the order, judgment or decree. . . ." Ill. Rev. Stat. 1939, Ch. 110, § 259.34.

301 Schafer v. Robillard, 370 Ill. 92, 17 N.E. (2d) 963 (1938). Note, 17 CHICAGO-KENT LAW REVIEW 175.

302 Francke v. Eadie, 301 Ill. App. 254, 22 N.E. (2d) 720 (1939). Note, 18 CHICAGO-KENT LAW REVIEW 89.

303 299 Ill. App. 157, 19 N.E. (2d) 753 (1939). Note, 17 CHICAGO-KENT LAW REVIEW 277.

304 Ill. Rev. Stat. 1939, Ch. 110, § 200.

reviewed by the Supreme Court; nor is the Appellate Court obliged to reverse and remand.[305]

CREDITORS' RIGHTS

The Supreme Court handed down two significant decisions with respect to the payment of interest. In *Blakeslee's Warehouses* v. *City of Chicago*,[306] it held, by a four to two decision,[307] that claims for interest on judgments are subject to the five-year statute of limitations. Justices Farthing and Orr dissented on the ground that both interest and costs are parts of the judgment itself,[308] and so subject only to the twenty-year statute applicable to the judgment. In the other case, *People* v. *Farmers State Bank*,[309] the court not only allowed creditors of an insolvent bank to recover interest from the time of the appointment of the liquidation receiver at the expense of the stockholders, on their double liability, but seemingly required the expenses of liquidation to be borne by them as well. Mr. Justice Farthing delivered the "opinion of the court," concurred in by Justices Stone and Shaw. That opinion proceeds upon the theory that the rule at law forbidding the charging of interest "unless authorized by contract or statute" is different from that in equity: Equity allows or withholds interest in accordance with what is equitable and just in view of all the circumstances in the case. Mr. Justice Gunn concurs specially on the rather ingenious theory that the stockholders' liability is really collateral which is available to the creditors, and that they may exhaust it first before proceeding against the other fund, the assets of the bank, and hence, that the interest comes not from the stockholders but from those assets. Justices Jones, Orr, and Wilson dissented upon the ground that under Section 6 of Article 11 of the Constitution[310] the stockholder "is obligated only for liabili-

305 Ebbert v. Metropolitan Life Insurance Co., 369 Ill. 306, 16 N.E. (2d) 749 (1938), construes Section 89 of the Civil Practice Act (Ill. Rev. Stat. 1939, Ch., 110, § 213) to be identical with the former practice and not to refer only to cases in which the court finds a mere failure to prove a prima facie case.

306 369 Ill. 480, 17 N.E. (2d) 1 (1938). Notes, 17 CHICAGO-KENT LAW REVIEW 189; 52 Harv. L. Rev. 532; 27 Ill. B.J. 238; 33 Ill. L. Rev. 854.

307 Mr. Justice Gunn did not participate.

308 Epling v. Dickson, 170 Ill. 329, 48 N.E. 1001 (1897).

309 371 Ill. 222, 20 N.E. (2d) 502 (1939).

310 "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of

ties accruing while he remains a stockholder,"[311] and that liabilities accruing subsequent to receivership are those of the receiver and neither of the bank nor of the stockholders.

Two decisions of the Appellate Court involving body executions should be noted. In *Pappas* v. *Reabus*[312] it was held that where a special finding of malice was made against only one of two defendants, judgment having been obtained against both, a body execution might properly issue against the one. The defendant relied upon *Raemisch* v. *Askounis*,[313] which invalidated such an execution on the ground that the execution "must follow the judgment and must on its face appear to be against all the defendants against whom judgment is entered."[314] The court distinguished the case upon the ground that in that case both defendants were subject to body execution, whereas here only one was so subject. The second case, that of *Ingalls* v. *Raklios*,[315] involves the interpretation of the amendment to Section 5 of Chapter 77, dealing with body executions.[316] The special finding of malice was not made at the time of the entry of judgment.[317] Justices Denis E. Sullivan and Hebel held that since the court had found the defendant "guilty as charged in plaintiff's statement of claim" and since the complaint charged malice, the two together constituted a sufficient finding. Mr. Justice Burke dissented, in a brief, well-reasoned opinion based upon

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stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder."

311 P. 231.

312 299 Ill. App. 499, 20 N.E. (2d) 327 (1939).

313 266 Ill. App. 611 (1932).

314 Raemisch v. Askounis was published in abstract only; the language quoted is set out in Pappas v. Reabus, supra, at p. 501.

315 301 Ill. App. 1, 21 N.E. (2d) 856 (1939).

316 Cahill's Ill. Rev. Stat. 1933, Ch. 77, ¶ 5: "No execution shall issue against the body of the defendant, except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum* [*respondendum*] as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors."

Ill. Rev. Stat. 1939, Ch. 77, § 5: "No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, and it shall appear from a special finding of the jury, or from a special finding by the court, if the case is tried by the court without a jury, that malice is the gist of the action, and except when the defendant shall refuse to deliver up his estate for the benefit of his creditors. [As amended by act approved July 11, 1935. L. 1935, p. 937.]"

317 Although seemingly later a notation was made in the record: "Court makes a special finding of malice."

the idea that the object of the amendment was to obviate the former objectionable practice of searching the pleadings for the purpose of determining whether or not malice was the gist of the action. One cannot escape the suggestion that the majority opinion, if sustained by the Supreme Court, will nullify one of the principal benefits of the amendment.

In *Lehman* v. *Cottrell*,[318] the Appellate Court has clarified the law with respect to the exemption of a homestead from judgment. It held that descent of the homestead to heirs was not equivalent to abandonment, but to a voluntary conveyance,[319] and that since the lien of a judgment does not attach to the homestead in the case of a voluntary conveyance, it will not attach upon death. Thus the judgment creditor was denied priority in the proceeds of the sale of the homestead to pay debts, and allowed only to share with general creditors.

In *Soft-Lite Lens Company, Inc.*, v. *Ritholz*[320] the court held that the exclusive distributor of a certain brand of tinted glasses who sold only to certain wholesalers could enjoin a retailer from palming off the latter's lenses as those of the distributor. The court dismissed the defendant's contention that the plaintiff must be a competitor of the defendant, and, following the general rule, held that the "palming off" doctrine is in itself a rule of decision and not merely an aspect of the principle of unfair competition which evolved from the basic idea that public policy forbids one person to sell his goods as those of another. The "palming off" doctrine is a rule of law generally followed in Illinois and elsewhere.

The court reiterates the principle that the degree of proof is the same in trade-mark cases as in those of unfair competition. Although the Supreme Court in *Candee, Swan & Company* v. *Deere & Company*[321] said that in trade-mark infringement cases the proof must be beyond a reasonable doubt, the case has not been followed and evidently has been overruled *sub silentio*. The court in the instant case, follow-

318 298 Ill. App. 434, 19 N.E. (2d) 111 (1939). Note, 23 Minn. L. Rev. 977.

319 Ill. Rev. Stat. 1939, Ch. 52, § 6: "When a homestead is conveyed by the owner thereof, such conveyance shall not subject the premises to any lien or incumbrance to which it would not have been subject in the hands of such owner. . . . "

320 301 Ill. App. 100, 21 N.E. (2d) 835 (1939).

321 54 Ill. 439 at 467 (1870).

ing a previous decision,[322] makes a distinction between clear preponderance, which is necessary, and slight preponderance, which is insufficient.

Next is considered the necessity of specific proof of damages. The court applies the rule in *Mossler* v. *Jacobs*,[323] though it does not cite it, to the effect that the plaintiff is not required to wait until injury has actually resulted from the "palming off" process; that all that need be proved is that probable customers would be misled. Several federal decisions are cited in support of this holding, the court being satisfied that the acts of the defendants if continued would result in damages injurious to the plaintiff's business.

The court, in addition to the above issues, had to consider an issue perhaps not precisely raised before. The defendants contended that the plaintiff's method of selling through designated licensees constituted a monopoly in restraint of trade. The court, however, rejected this argument and thought that the plaintiff licensed certain dealers to handle its product in order to protect its business by designating proper persons to handle its product. Accordingly, in effect, the court found no controlling of prices, limitation of production, or suppression of competition, which were discussed in *Moody & Waters Company* v. *Case-Moody Pie Corporation*.[324] This ruling is in accord with *Brown* v. *Rounsavell*,[325] which held that exclusive sales agreements are not in restraint of trade.[326]

### CONFLICT OF LAWS

The perplexing question of what law to apply in determining the validity of a contract entered into outside of this state was considered by the Supreme and Appellate Courts in the case of *Frankel* v. *Allied Mills, Inc.*[327] The plaintiff, a licensed real estate broker in Illinois, having learned that the defendant desired to sell factory property located in Peoria, Illinois, contacted the president of defendant company in New York. After some discussion the president orally agreed

322 The Stevens-Davis Co. v. Mather & Co., 230 Ill. App. 45 (1923).
323 66 Ill. App. 571 (1896).
324 354 Ill. 82, 187 N.E. 813 (1933).
325 78 Ill. 589 (1875).
326 In accord, Southern Fire Brick Co. v. Sand Co., 223 Ill. 616, 79 N.E. 313 (1906); Wieboldt v. Standard Fashion Co., 80 Ill. App. 67 (1899); and Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373 (1905).
327 369 Ill. 578, 17 N.E. (2d) 570 (1938); 293 Ill. App. 48, 11 N.E. (2d) 979 (1937).

that $25,000 commission would be paid if a "satisfactory deal" was made. Further negotiations, after an agreement had been reached with a purchaser presented by the plaintiff, reduced the amount of commission to $17,000. In a suit for this commission, the defendant contended that since the sale finally fell through no commission was due, and that the agreement to pay a commission was illegal and void since the plaintiff had not procured a New York real estate broker's license. The plaintiff prevailed in the Appellate Court where it was held that the fact that plaintiff was not licensed to carry on the real estate business in New York was "wholly immaterial."[328] Principal reliance was placed upon the case of *Zeigler* v. *Illinois Trust and Savings Bank.*[329]

But the Supreme Court ordered judgment for the defendant, passing only upon the question of the validity of the contract to pay commission. The familiar language, "the validity, construction and obligation of a contract must be determined by the law of the place where it is made or is to be performed," appears in the opinion.[330] The argument of the plaintiff that the New York statutes regulating the real estate brokerage business applied merely to the "remedy" as distinct from the "right" was rejected.

The question here involved concerns what is frequently called the "essential validity" of a contract. A striking lack of uniformity exists in the answers which American courts have given to this question.[331] This lack of uniformity results in part from a failure to examine the local rules governing the validity of contracts critically as regards their function and purpose.

In the present case the final result reached in the Su-

328 293 Ill. App. at p. 52.

329 245 Ill. 180, 91 N.E. 1041 (1910). In this case an Illinois physician accompanied his patient to California and attended her there. In a suit for his services it was contended that he could not recover since he was not licensed to practice medicine in California. This contention was rejected.

330 369 Ill. at p. 582.

331 Stumberg, Conflict of Laws, 1937, p. 199 et seq.; Goodrich, Conflict of Laws (2d ed.), 1938, p. 273. In some cases the law of the place of the making of the contract is said to control. In others the law of the place of performance has been applied. In still other cases it has been said that the law the parties intended to govern the contract will control. It is frequently said that where the place of making and of performance coincide, the parties intended the law of that place to govern. Cf. Am. Law Inst., Rest., Conf. Laws, §§ 311, 332, 347, "the law of the place of contracting."

preme Court seems justified.[332] The court first examined the New York statutes to determine their effect upon contracts within their terms. It was concluded that the statutes rendered contracts for commissions made by unlicensed brokers void.[333] The court then considered the question of whether the New York statutes were applicable to the act of a nonresident in negotiating a sale of land situated in another state. The legislative purpose was found to be protection of New York vendors and purchasers against the activities of persons not possessing proper qualifications. It was held that the statutes applied as well to nonresidents as to residents, and to sales of land without as well as within the state.[334] If the acts of the plaintiff were within the view of the New York statutes, his contract to act as broker was void and could not be the basis for a recovery of commission in Illinois.[335]

Of passing interest are two cases involving the problem of the enforcement in Illinois of judgments obtained in other states. In *Baker* v. *Brown*[336] the First District Appellate Court held that a judgment obtained in Oklahoma for an amount in excess of the amount claimed in the pleadings and which was not responsive to the issues therein was void and not entitled to full faith and credit in Illinois. The court referred to Oklahoma decisions which held that judgments outside the issues made by the pleadings were void when obtained in that state. *Roberts* v. *Sauerman Bros., Inc.*,[337] is a case in which the summary judgment provisions of the Civil Practice Act were used to secure such a judgment based upon a judgment obtained in a Kentucky circuit court. Questions as to the validity of the Kentucky proceedings were passed upon by

332 It should be noticed that the Supreme and Appellate Courts do not entirely agree on the facts of this transaction. The Appellate Court took the view that the contract really had its inception in Illinois instead of in New York. This variation is no doubt responsible in some degree for the difference in result.

333 N.Y. Consol. Laws, 1930, Ch. 51, Art. 12-A, § 442-e, makes it a misdemeanor for an unlicensed person to act as broker.

334 It should be noticed that section 440-a of these statutes applies to any person "temporarily" acting as broker. N.Y. Consol. Laws, 1930, Ch. 51, Art. 12-A, § 440-a.

335 Principal reliance was placed upon the case of Burr v. Beckler, 264 Ill. 230, 106 N.E. 206 (1914).

336 298 Ill. App. 173, 18 N.E. (2d) 578 (1938).

337 370 Ill. 344, 18 N.E. (2d) 883 (1939). The Supreme Court ordered the cause transferred to the Appellate Court on the ground that no constitutional question was involved.

the Court of Appeals of that state and were thus finally determined. The summary judgment was held proper by the Appellate Court for the First District.[338]

## GOVERNMENT

### TAXATION

At the last session the General Assembly revised the General Revenue Laws of the State.[339] The function of this revision is integration and correlation of overlapping and conflicting provisions of the existing laws, and not reform.

Most of the significant decisions of the Supreme Court have concerned sales taxes. However, one very important decision affecting the general revenue was rendered, that of *Griffin* v. *County of Cook,*[340] in which the court, in a four to three decision, invalidated the Pre-adjudication Tax Act,[341] providing a method of confirming levies prior to the spreading of the tax. The principal ground relied upon was the inadequacy of the provisions with respect to notice, *i.e.,* publication. The theory was that the rates are an ingredient in personal property tax liability, and that since such liability is *in personam,* the mere publication of a notice in a newspaper is insufficient to sustain jurisdiction. Two justices,[342] concurring specially, gave several additional objections, *i.e.,* that it applies only to tax payers in the city of Chicago, that it attempts to confer a nonjudicial function upon the county court, and that in other respects it deprives the tax payer of due process of law. These matters have been discussed in a recent law review comment.[343]

The new pre-adjudication statute enacted at the last session[344] probably meets the principal objection to the former statute—insufficiency of notice—by specifying the time of hearing in the statute itself. Whether or not the remaining objections invalidate the new act will, of course, depend upon whether the two justices who relied only upon the obviated

338 Roberts v. Sauerman Bros., Inc., 300 Ill. App. 213, 20 N.E. (2d) 849 (1939).
339 Laws 1939, P. 886 et seq.
340 369 Ill. 380, 16 N.E. (2d) 906, 118 A.L.R. 1157 (1938). Note, 6 U. of Chi. L. Rev. 326.
341 Ill. Rev. Stat. 1939, Ch. 120, § 110.1 et seq.
342 Stone and Farthing, JJ.
343 "The Illinois Pre-adjudication Tax Statute," 33 Ill. L. Rev. 685 (1939).
344 Laws 1939, p. 848 et seq.; Ill. Rev. Stat. 1939, Ch. 120, § 812 et seq.

objection will now support one of the further objections noted in the concurring opinion or hold with the dissenting justices concerning them. It may be well to note also that the new statute transfers the confirmation proceedings from the county to the circuit court. Just why this was done is not too clear. Perhaps it was felt that, assuming validity, greater finality would attach to a decree of a court of general jurisdiction, after the device of *Brown* v. *Jacobs*.[345] It would seem, however, that the change would tend to magnify the objection urged in the concurring opinion, that the statute attempts to confer a nonjudicial function on a court.

The Supreme Court sustained the constitutionality of another tax provision against an objection based upon procedural due process, in *Hunt Drainage District* v. *Schwerer*.[346] Section 34c1 of the Drainage Act[347] provides, in substance, that when certain assessments are more than six months in default, the commissioners of the district may apply to any court of competent jurisdiction "by bill or petition" for the appointment of a receiver to collect the rents and apply them, among other things, to the payment of the delinquent assessments. Although the procedure for the appointment of the receiver is not prescribed, the court held that the statute contemplated a civil procedure in equity under the Civil Practice Act, and, as so construed, was unquestionably valid.

Four decisions determining inclusions and exclusions under the Occupational Sales Tax Act have been rendered.[348] The most significant of these is *Revzan* v. *Nudelman*,[349] holding the act inapplicable to a wholesale leather dealer who sells sole leather and rubber heels to shoe repairmen, upon the ground that the transaction is not a sale of articles for use or consumption. It is interesting to note that the parties had stipulated that the repairmen were not subject to the tax, and that the court admits that the technique of the present case may create a situation wherein no one will be liable for the tax. The court said: "To hold that one party is

345 367 Ill. 545, 12 N.E. (2d) 10 (1937). See 17 CHICAGO-KENT LAW REVIEW 64.
346 369 Ill. 330, 16 N.E. (2d) 737 (1938).
347 Ill. Rev. Stat. 1939, Ch. 32, § 33b1.
348 Ill. Rev. Stat. 1939, Ch. 120, §§ 440 et seq.
349 370 Ill. 180, 18 N.E. (2d) 219 (1938). Note, 17 CHICAGO-KENT LAW REVIEW 192.

liable to a tax because another party is not liable, would be an anomaly in the law."[350] Theretofore, it seems to have been tacitly assumed that someone, somewhere along the line between the producer and the actual consumer, must pay the tax.[351] The new attitude is reaffirmed in *American Optical Company* v. *Nudelman*,[352] holding wholesalers who manufacture and deliver optical supplies upon prescriptions and orders from optometrists and oculists not liable. The optometrists and oculists themselves had been previously held not liable in *Babcock* v. *Nudelman*.[353] In the present case, the court said, citing *Revzan* v. *Nudelman*: "The fact that eyeglasses and other optical supplies handled by optometrists and oculists will not be taxed at all unless we hold wholesale opticians liable is of no significance."

In the other two cases the Supreme Court sustained liability, in *Acme Printing Ink Company* v. *Nudelman*,[354] with respect to ink sold to printers, and in *Smith Refining Company* v. *Department of Finance*,[355] with respect to core oil sold to foundries, the court rejecting in each instance the contention that the vendee did not use and consume the property so sold, but purchased for resale.

During the past year, however, the questions of liability have more or less yielded the stage to the problem of claims for refund, particularly the large body of contractors' claims resulting from the Herlihy case.[356] Mandamus proceedings to compel both cash refunds and credits have been sustained, both on original proceedings in the Supreme Court in *People ex rel. Blome* v. *Nudelman*,[357] and on petition to the Circuit Court in *People ex rel. Herlihy Mid-Continent Company* v. *Nudelman*.[358] It is to be noted in this connection that the legislature has limited claims for refunds by providing that

350 P. 186.

351 See Bradley Supply Co. v. Ames, 359 Ill. 152, 194 N.E. 272 (1935); Blome Co. v. Ames, 365 Ill. 456, 6 N.E. (2d) 841, 111 A.L.R. 940 (1937); and Herlihy Mid-Continent Co. v. Nudelman, 367 Ill. 600, 12 N.E. (2d) 638, 115 A.L.R. 485 (1937). Notes, 16 CHICAGO-KENT REVIEW 294; 32 Ill. L. Rev. 685.

352 370 Ill. 627, 19 N.E. (2d) 582 (1939).

353 367 Ill. 626, 12 N.E. (2d) 635 (1937). Note, 32 Ill. L. Rev. 685.

354 371 Ill. 217, 20 N.E. (2d) 277 (1939).

355 371 Ill. 405, 21 N.E. (2d) 292 (1939).

356 Herlihy Mid-Continent Co. v. Nudelman, 367 Ill. 600, 12 N.E. (2d) 638, 115 A.L.R. 485 (1937).

357 371 Ill. 30, 19 N.E. (2d) 933 (1939).

358 370 Ill. 237, 18 N.E. (2d) 225 (1938).

no erroneous payment of tax shall be credited or refunded unless a claim therefor is filed within three years from the date of such payment.[359]

Several decisions have been rendered concerning the practice of the Department of Finance under Section 8 with respect to investigations and hearings, and limiting the right to object to the amount of the assessment to the hearing before the Board itself, or in a court on the certiorari provided in Section 12.[360]

PUBLIC UTILITIES

Two cases affecting public utilities may be of considerable significance. In *City of Chicago* v. *Hastings Express Company*[361] the Illinois Supreme Court sustained the right of municipalities to impose wheel taxes upon vehicles owned and operated by public utility companies. The utility sought to escape such taxes upon the ground that the imposition of license taxes would constitute an interference with the exclusive power of regulation of such utilities conferred by the legislature upon the Commerce Commission. The court held that the tax in question was not a regulatory device, but "purely a revenue measure."

*American Generator & Armature Company* v. *Commonwealth Edison Co.*,[362] while only an Appellate Court decision, passes upon a far more significant question, that of whether reparations for overcharges on utility rates may be sought in court in the first instance, or whether application must be made to the Commerce Commission. In a proceeding instituted in the Superior Court of Cook County, the plaintiff charged that the defendant, a public utility engaged in the business of selling electrical energy and lamps, in its charges for electricity under certain rates had included and concealed within them a charge for lamp service of half a cent per kilowatt hour of electricity used, which made the rates and practices in connection therewith illegal. The court affirmed an order dismissing the complaint, on the ground

359 Laws 1939, p. 884; Ill. Rev. Stat. 1939, Ch. 120, § 445.

360 Department of Finance v. Gold, 369 Ill. 497, 17 N.E. (2d) 13 (1938); Department of Finance v. Cohen, 369 Ill. 510, 17 N.E. (2d) 327 (1938); and Anderson v. Department of Finance, 370 Ill. 225, 18 N.E. (2d) 237 (1938).

361 369 Ill. 610, 17 N.E. (2d) 576 (1938).

362 298 Ill. App. 192, 18 N.E. (2d) 735 (1939).

that recourse must first be had to the commission for the purpose of determining the amount due. Although the court regarded the earlier Supreme Court case of *Consumers Sanitary Coffee & Butter Stores* v. *Commerce Commission*[363] as controlling, it is submitted that the instant decision goes far beyond the scope of that case.[364] That case involved a review and reversal of proceedings instituted before the commission itself under Section 72 of the Public Utility Act,[365] and the court very properly remanded the matter to the commission for proper action, including the determination of the amount due. The Appellate Court felt that the Supreme Court "in effect, adopted the same rule as that adopted by the Supreme Court of the United States."[366] It seems clear from the brief opinion of the Consumers case that the court felt that only one controversial question was before it—that of the validity of the rates. However, even if Illinois be regarded as committed to the federal rule, the desirability of which can hardly be disputed, it may be queried whether that rule would require initial recourse to the commission in the instant case. Such recourse could hardly be justified either on the basis of some discretionary question or in the interest of promoting uniformity. It is difficult to see how either could be involved here.[367]

363 348 Ill. 615, 181 N.E. 411 (1932).

364 In the Consumers case the Supreme Court invalidated what appear to be the precise charges herein questioned.

365 Ill. Rev. Stat. 1939, Ch. 111 ⅔, § 76.

366 The court quotes from Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922), the following passage as illustrative of the federal rule: "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

367 It will be noted that in the Merchants Elevator case so strongly relied

MISCELLANEOUS

In *Gunnell* v. *Palmer*[368] the Supreme Court held that the provision of 1929 of the Chancery Act[369] which authorizes the court to appoint some competent and disinterested person as trustee of the interests of persons not in being does not violate due process of law, inasmuch as such persons are represented and have their day in court through the person of their trustee.[370]

In *Rosen* v. *Rosen*,[371] the court sustained Section 137 of the Administration Act,[372] empowering the probate court to sell land on which a legacy is charged, where there is not sufficient personal estate for payment of the legacy. The court pointed out that in view of the impossibility of settling the estate without selling the land, such sale must be embraced within the term "probate matters."[373]

In *Chicago Park District* v. *Canfield*[374] the Supreme Court invalidated an ordinance of the Park District providing that "no person shall drive any vehicle in the Park System upon which there is displayed any commercial placard or advertisement of any kind" as being too broad to come within the statutory power of the Park District to exclude "objectionable travel and traffic." Seemingly the principal vice of the ordinance lay in its failure to specify just which advertising was prohibited, it being assumed that all could not be prohibited, with the result that "the act is not complete but leaves to the determination of the officers of the park district what advertising comes within it and what does not."

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upon, initial recourse to the commission was not required, on the ground that the problem was merely one of law, that is, construction, and not of fact. That case involved a suit in a state court to recover an over-charge. See also Mitchell Coal and Coke Co. v. Pennsylvania R. Co., 230 U.S. 247, 33 S. Ct. 916, 57 L. Ed. 1472 (1913); and cases collected in a note in Cases on the Law of Public Utilities, Smith, Dowling & Hale, West Publishing Co., St. Paul, Minn., 1936, p. 1033.

368 370 Ill. 206, 18 N.E. (2d) 202 (1938).

369 Ill. Rev. Stat. 1939, Ch. 22, § 6.

370 See 34 Ill. L. Rev. 101.

371 370 Ill. 173, 18 N.E. (2d) 218 (1938).

372 Ill. Rev. Stat. 1939, Ch. 3, § 139.

373 Ill. Const. 1870, Art. 6, § 20: "Said courts, when established, shall have original jurisdiction of all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlement of their accounts; in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts."

See "Jurisdiction of the Illinois Probate Court," 17 CHICAGO-KENT LAW REVIEW 169 (1939).

374 370 Ill. 447, 19 N.E. (2d) 376 (1939).

In *Bryan* v. *City of Chicago*[375] the Supreme Court held valid a statute which makes cities liable for injuries to persons or property caused by the negligent operation of fire department vehicles. To the objection that the statute was special and arbitrary in that it did not apply to other municipal vehicles, the court answered that the greater danger and risk involved in the operation of fire department vehicles constituted a reasonable basis for the classification.

In *McKinely* v. *City of Chicago*[376] the Illinois Supreme Court has unequivocally reaffirmed the doctrine that payment of salary to a *de facto* officer prior to determination of the status as such of a *de jure* officer is a complete defense to a claim for salary by such *de jure* officer during the encumbency of the *de facto* officer.[377] The plaintiff, *de jure* officer, had succeeded in an election contest, and brought the present claim for salary for the period the *de facto* officer was encumbent.

A second interesting election case was decided by the Supreme Court, that of *Pope* v. *Board of Election Commissioners,*[378] involving not the right to office or its emoluments, but the right to vote. The court held that mere "domicile" and "residence"[379] were not synonymous and gave strict effect to the provision[380] that "a permanent abode is necessary to constitute a residence . . . ."[381]

In *Thrift, Inc.* v. *State Bank & Trust Company,*[382] the Appellate Court declined to enforce a contract between the defendant bank and the plaintiff, a corporation engaged in the promotion of school savings, to install and maintain a system by which deposits would be received in the schools and transmitted to the defendant bank's messengers, upon the ground that the system contemplated branch banking in violation of the Illinois statute.[383] The decision is probably incorrect, in view of a specific proviso in another portion of the

375 371 Ill. 64, 20 N.E. (2d) 37 (1939).
376 369 Ill. 268, 16 N.E. (2d) 727 (1938). Note, 23 Minn. L. Rev. 537.
377 See Hittell v. City of Chicago, 327 Ill. 443, 158 N.E. 683, 55 A.L.R. 994 (1927); also, note, 55 A.L.R. 997.
378 370 Ill. 196, 18 N.E. (2d) 214 (1938).
379 Ill. Const. 1870, Art. 7, § 1; Ill. Rev. Stat. 1939, Ch. 46, § 65.
380 Ill. Rev. Stat. 1939, Ch. 46, § 66.
381 See note, 27 Ill. B.J. 345.
382 298 Ill. App. 501, 19 N.E. (2d) 126 (1939).
383 Ill. Rev. Stat. 1939, Ch. 16½, § 9.

statute apparently sanctioning school savings arrangements,[384] a provision which court and counsel seem to have overlooked entirely.[385]

In *People* v. *Board of Supervisors*,[386] the Appellate Court held that the board has no discretion in the matter of making payments under the provisions of the Blind Relief Act,[387] that the duties imposed upon them are ministerial and that a party who brings himself within the provisions of the act can compel the performance of such duties by mandamus, and that a judgment is not a condition precedent to the right to maintain such proceeding.

384 Ill. Rev. Stat. 1939, Ch. 16½, § 16: ". . . nothing herein contained shall be construed to prohibit banks incorporated under the laws of this State or of the United States from appointing natural persons as agents to receive deposits of savings in and through the public schools."

385 See note, 6 U. of Chi. L. Rev. 688.

386 299 Ill. App. 575, 20 N.E. (2d) 904 (1939).

387 Ill. Rev. Stat. 1939, Ch. 22, §§ 279 et seq.